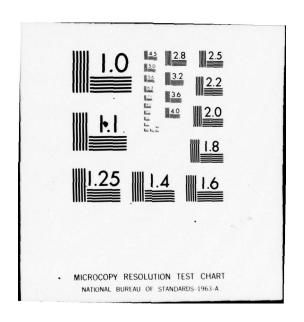
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A SERVICEMAN'S FIRST AMENDMENT RIGHTS.

O Final rept.

J.S.D. Thesis

Submitted In Partial Fulfillment
Of The Requirements For
The Degree of Doctor of Juridical Science

by

10 Hugh E./Henson, Jr.



Yale Law School New Haven, Connecticut

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Analysis of applicability of the First Amendment to the U.S. Constitution to members of the Armed Forces.





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### A SERVICEMAN'S FIRST AMENDMENT RIGHTS

If [a serviceman] asks: Does being in the Army curtail or suspend certain Constitutional rights?, the answer is unqualifiedly "yes." Of necessity, he is forced to surrender many important rights. He arises unwillingly at an unreasonable hour at the sound of a bugle unreasonably loud. From that moment on, his freedom of choice and will ceases to exist. He acts at the command of some person--not a representative of his own choice--who gives commands to him which he does not like to obev. He is assigned to a squad and forced to associate with companions not of his selection and frequently the chores which he may be ordered to perform are of a most menial nature. Yet the armed services, their officers and their manner of discipline do serve an essential function in safeguarding the country. The need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty.

In listing all his constitutional impairments plaintiff forgets that it is the Constitution which authorizes the creation of an Army. Plaintiff's and his fellow citizens' duly elected representatives enacted the draft legislation. He knew that he could fulfill his military obligations by enlisting in the Army for two or for six years. It is the same Army-only the period of service differs. Plaintiff concedes that, had he elected the two-year period he would have had to conform to Army Regulations including the length of his hair. However, plaintiff chose the six-year enlistment undoubtedly because it offered certain inducements. Not the least of these inducements was probably the ability to carry on various civilian activities and to avoid the raucous sounds of daily bugles and the regimented day thereafter -- or even possibly foreign service. But these civilian activities were permissive, they were not constitutional rights. Plaintiff was still in the Army and subject to Army discipline. He was not a free agent.

> --Moore, Circuit Judge Raderman v. Kainel

<sup>1411</sup> F.2d 1102, 1104 (2d cir. 1969).

Does a member of the Armed Forces have any constitutional rights as a serviceman? Indeed, does the Constitution—
particularly the Bill of Rights—apply at all to him, so long
as he remains a member of the service? And in the specific
case of the First Amendment rights to freedom of religion and
freedom of expression, how fares the serviceman there? These
questions are not mere hypothetical "straw—men" questions;
they are questions which deal with a real-life situation,
which has affected millions of former servicemen, hundreds of
thousands of present—day servicemen, and which in all probabil—
ity will impinge on the lives of countless numbers of members
of future generations of United States citizens.

The purpose of this paper is to attempt to shed some light on these questions, at least insofar as they apply to the First Amendment. But doing so will be no simple matter. In the first place, the problem of a serviceman's First Amendment rights is partly only a reflection of the larger problem of whether the Bill of Rights applies to him at all. And even if it does, to what extent does it apply? The Supreme Court has never ruled on the First Amendment rights of servicemen; but, as will be outlined shortly, some light is thrown on the issues involved by the Court's holdings and dicta on the applicability of the first ten amendments to courts—martial. Thus even though a great amount of the discussion which will follow will concern constitutional issues involved in courts—

martial, it must be remembered that the principles which have evolved in that area are the only source from which analogies can be drawn to determine whether the First Amendment applies to servicemen, and if so to what extent.

There is another problem which must be kept in mind. No one has ever said that the Constitution does not apply to servicemen. Indeed, as the following discussion should amply demonstrate, servicemen's rights were long considered to be limited because of the Constitution. The argument was that Article I, \$ 8, clause 14, gave Congress the specific and direct right, authority, and power "To make Rules for the Government and Regulation of the land and naval Forces." This power was originally considered absolute and in no wise affected or limited by the Bill of Rights. Thus the issue has never been whether servicemen have "constitutional rights"; of course they do. Rather, the real issue has always been to what extent the privileges incorporated in the Bill of Rights apply to servicemen. Thus when the phrase "constitutional rights" is used in this paper, it will mean those rights contained in the Bill of Rights and should not be construed to imply that servicemen have no rights under the Constitution.

A court-martial case will serve to illustrate these

<sup>2</sup>Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 137-138 (1967)
(concurring opinion).

points. When an accused named Deain was tried before a United States Navy general court-martial in 1953, an admiral named Ruddock was appointed to be a member of the court--meaning, he was appointed to sit as the equivalent of a jury member in a civilian court. Admiral Ruddock was interrogated by the defense on voir dire. The discussion turned to the presumption of innocence, and the admiral was asked whether he thought such a presumption existed before military courts-martial. The admiral replied that he thought "that persons in the military service had no constitutional rights,"3 and, therefore, that the presumption did not exist from the Constitution. However, Admiral Ruddock did allow that certain constitutional rights which exist in civilian law have been duplicated by Congress in the Uniform Code of Military Justice, 4 and he also allowed that the presumption of innocence was one of those rights. Even so, the admiral stated that he thought that military pre-trial investigations were so good that no one could possibly be brought before a general court-martial unless he were "probably" guilty of "something." Notwithstanding a defense challenge, the ad~

<sup>3</sup>United States v. Deain, 5 U.S.C.M.A. 44, 48; 17 C.M.R.
44, 48 (1954).

<sup>410</sup> U.S.C. \$\$ 801-940 (1970). [Hereinafter, all citations will be to the "U.C.M.J." with the article number following. The United States Code section for any particular article can be computed by adding the figure 800 to the article number.

miral was permitted to remain a member of the court, and a conviction ensued.

On appeal to the United States Court of Military Appeals, the defense challenged again the admiral's impartiality. While all the judges concurred that the admiral was not impartial, and while they unanimously reversed the conviction, the three judges split badly over the constitutional issue. The principal opinion was written by Chief Judge Quinn. He clearly met the constitutional point, saying that

. . . Admiral Ruddock's statement [was] that he did not regard military personnel as possessing any constitutional rights other than those which may be duplicated by specific grants from Congress. . . . As to [this], we disagree with Admiral Ruddock. 5

Judge Brosman concurred in the result in a separate opinion, and concerning the constitutional issue said

There is a good deal to be said on the question of whether military personnel possess "any constitutional rights other than those which may have been duplicated by specific grants from Congress"--but I see no real point in saying it here.

Judge Latimer also concurred in the result in a separate opinion, but he did not address the constitutional issue at all.

At best, it is difficult to say whether, from the quoted opinions in the 1954 <u>Deain</u> case, the Court of Military Appeals held that the presumption of innocence before courts-martial derived from the Fifth and Sixth Amendments to the Constitu-

<sup>55</sup> U.S.C.M.A. at 50, 17 C.M.R. at 50.

<sup>65</sup> U.S.C.M.A. at 56, 17 C.M.R. at 56.

Justice. However, in a "Fact Sheet" concerning military justice, published by the Department of the Army with the date of 26 October 1971, the following paragraph appears:

3. A military accused is now, as before, presumed innocent until proven guilty beyond a reasonable doubt. A court-martial is a full adversary proceeding in every respect. The provisions of the Bill of Rights apply in the military (except where inapplicable by their own terms for by necessary implication) and an accused is entitled to full constitutional safe-guards. 7

Comparing the 1954 Court of Military Appeals split opinion in the <u>Deain</u> case with the Department of the Army "fact sheet" of 1971, one is inclined to quote the current women's cigarette advertisement and say "You've come a long way, baby!"

However, one still wonders. The <u>facts</u> of military life are as stated above by Judge Moore. How, then, can the Army's "fact sheet" and the facts of Army life be reconciled—or, indeed, can they?

Perhaps the Army's "fact sheet" is only another manifestation of the military's ongoing trend towards a "managerial" concept of operations, as outlined in detail in Morris Janowitz's excellent sociological study of the military, The Professional Soldier. But even so, it is difficult to say

<sup>7</sup>U.S. Dept. of the Army, Information on Current Issues 6-7 (14 May 1971, as amended through 26 October 1971).

<sup>8</sup>M. Janowitz, The Professional Soldier (1960).

that the statement in the Army "fact sheet" only means that the military and Congress have been working together to amend the Uniform Code of Military Justice to grant military accused before courts-martial the same rights as civilian accused before the federal criminal courts, as simply a better way to manage the military. If this were so, the rights in question would not stem from the Bill of Rights; they would, as the Navy admiral said in Deain, simply be duplications of those rights. And, of course, if they existed only because duplicated by Congress, presumably Congress could take them away. 9 Additionally--and to be more fair to Admiral Ruddock than it may appear above -- there has been doubt in the past whether members of the Armed Forces do have rights under the Bill of Rights. And that doubt has not been ephemeral but a real, serious, and substantial doubt. Even the Chief Judge of the Court of Military Appeals, who so grandly said "we disagree with Admiral Ruddock," 10 in the Deain case, had himself two years earlier joined in an opinion of the Court of Military Appeals which

<sup>9&</sup>lt;u>See</u> Reid v. Covert, 354 U.S. 1, 37: "We recognize that a number of improvements have been made in military justice recently by engrafting more and more of the methods of civilian courts on courts-martial. . . . [However.] the reforms are merely statutory; Congress—and perhaps the President—can reinstate former practices, subject to any limitations imposed by the Constitution, whenever it desires. As yet it has not been clearly settled to what extent the Bill of Rights and other protective portions of the Constitution apply to military trials."

<sup>10</sup> United States v. Deain, supra n. 5.

specifically held that a military accused's right to due process before courts-martial generated only from specific grants from Congress and not from the Constitution. 11 And further to be fair to all concerned, such a view is supported by sound historical and legal precedent.

Additionally, there are many who would say that, notwithstanding any statements of "fact" by the Army or any other part of the military establishment, concerning the constitutional rights of members of the Armed Forces, those individuals still do not have any rights under the Bill of Rights. They would say that Judge Moore's words, as quoted above, clearly demonstrate the correctness of their view. Particularly in relation to the First Amendment, they might charge that the Army's "fact sheet" is itself further proof of their contentions, since it clearly states that there are some undefined (but perhaps critical) portions of the Bill of Rights which do not apply to members of the Armed Forces -- or at least that those portions of the Bill of Rights which do apply nonetheless apply "differently." What these critics really do not like, particularly in relation to the First Amendment, is that the military admittedly curtails the full, free, and absolutely unfettered right to free speech and dissent by members of the military, usually in the name of good military order and discipline. This argument

<sup>11</sup>United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74
(1951).

seems, however, to overstate the case, since it is clear that even civilians do not have "full, free, and absolutely unfettered rights" under the First Amendment. Those who might answer such a charge would probably do so in terms that, while the provisions of the First Amendment, and indeed the remainder of the Bill of Rights, do apply to servicemen, there is justification for a "different" -- and somewhat more limited -application. To some this might appear to be a rather "un-American" answer, since it somehow seems unfair for the Government to draft an individual and force him into military service when he has done no wrong, 12 and then when he gets there, involuntarily, his constitutional rights are somenow diminished by the very fact that he is there. To the antimilitary polemecist, to say that a military person's constitutional rights are "different," and more limited than those of a civilian, confirms his worst forebodings. 13

It is my goal to examine a serviceman's First Amendment rights in a detached and detailed manner to ascertain just what are those differences and limitations which apply

<sup>12</sup>A convict's rights may be similarly limited, but because he is convicted of committing a criminal offense and sentenced to a prison term. Servicemen are supposedly drafted to serve their country, and thus a diminution of their rights connotes an unfairness clearly not evoked when a convict's rights are similarly diminished.

<sup>13</sup> See, e.g., R. Sherrill, Military Justice is to Justice as Military Music is to Music (1971); Sherman, The Military Courts and Servicemen's First Amendment Rights, 22 Hastings L. J. 325 (1971).

to him and what--if, indeed, any--justification for them exists. As a preliminary to this, however, because as noted above there is sound historical and legal precedent for the view that the Bill of Rights does not apply at all to members of the military, a basic question which must first be resolved is whether such rights now <a href="Legally">Legally</a> exist, notwithstanding the Army's statement of "fact" that they do. Assuming a positive answer, then a detailed examination of the way in which the First Amendment applies to servicemen may be undertaken.

Before proceeding, however, it should be made clear that my thesis is that, under current law, the Bill of Rights clearly applies to members of the Armed Forces, but that the manner in which it applies, and consequently the actual rights which accrue, are indeed different from and in some instances more limited than those which accrue to civilian United States citizens. Exactly what those differences and limitations are in relation to the First Amendment, and what justification for them there is, if any, will be the major subject of discussion.

#### PART I

#### DOES THE BILL OF RIGHTS APPLY TO SERVICEMEN?

## A. The Original Understanding

In attempting to give meaning to the words of the Constitution, one method which courts and commentators alike employ is to attempt to ascertain the "original understanding" of the drafters of the Constitution, who are frequently denominated the "Founding Fathers" or the "Framers." In relation to the question of whether the Bill of Rights was intended by the original understanding of the Framers to apply to courts-martial, an interesting and definitive series of articles appeared in the Harvard Law Review in 1957 and 1958. The first article, by a 1957 Harvard Law School graduate named Gordon D. Henderson, 14 has as its thesis that the Founding Fathers intended the provisions of the Bill of Rights to apply to courts-martial. In rebuttal, a monumental article, published in two parts in 1958, was written by Colonel Frederick Bernays Wiener. 15 Colonel Wiener sadly but thoroughly and successfully rebutted Mr. Henderson's thesis. Because of the importance of this point, and because of the thorough-

<sup>14</sup>Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957).

Harv. L. Rev. 1 (Part I) and 266 (Part II) (1958).

ness and scholarly excellence of Colonel Wiener's discussion, a brief review of his article is in order.

First, Colonel Wiener made three points concerning factual conditions as they existed in 1789-1791, when the Bill of Rights was under consideration and finally adopted. Initially, Colonel Wiener pointed out that the size of the military was exceedingly small; in fact, in August 1789, there were only 672 members of the Army out of a total of 850 authorized by Congress. There was no Navy. 16 Secondly, he stressed the fact that the Federal military was an allvolunteer force, and that there was no Federal draft until the Civil War. 17 Finally, he stressed that the Articles of War as they existed in 1789-1791 denounced mainly military offenses which were not triable at common law in the civilian courts, and that the Articles required most offenses which were triable at common law to be tried in the civilian courts. This latter requirement was accomplished by a provision in the Articles of War that upon the request of the civilian authorities, military officers in command would turn over to those authorities such persons as were under their military control who were liable for prosecution for common law crimes within the competence of the civil courts. 18 In other words, it ap-

<sup>16</sup> Id. at 9, n. 48.

<sup>17</sup> Id. at 8, n. 47.

<sup>18&</sup>lt;sub>Id</sub>. at 10-11, n. 59-68.

pears that the military was of such insignificance during the period 1789-1791 that no meaningful consideration of it as either falling within or not falling within the purview of the Bill of Rights was ever made. In addition, the military crimes denounced by the Articles of War were few, and if military justice was "rough and ready," the old argument that "You volunteered for it:" could always be made. Colonel Wiener analogized this anomaly to the same anomaly that existed in relation to slaves: That to the same extent slaves' rights and indeed the very concept of slavery itself was not deemed to be inconsistent with the grand privileges of the Bill of Rights, so the exclusion therefrom of members of the Armed Forces was also not deemed inconsistent.

Second, Colonel Wiener analyzed the passage by Congress of the Articles for the Government of the Navy in 1799 and 1800, and the passage of the revised Articles of War in 1806, all to ascertain to what extent the Bill of Rights was considered by Congress as having any impact on these statutes. Colonel Wiener concluded that the Bill of Rights was not raised as a serious issue in any of the debates, <sup>19</sup> and that the right to counsel was omitted from court-martial procedure in the old common-law tradition, which did not provide for counsel except in cases of treason. <sup>20</sup>

<sup>19&</sup>lt;sub>Id</sub>. at 13-22.

<sup>20</sup> Id. at 4, n. 18-19.

Finally, Colonel Wiener examined the practices of the Presidents of the United States in relation to the right to counsel established in the Bill of Rights, vis-a-vis courts-martial. Article 65 of the 1806 Articles of War required any court-martial affecting a general officer to be "transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case." Thus it is important what the early Presidents did in such cases, particularly since some of them (notably Madison) were personally instrumental in drafting the Bill of Rights itself.

The case which Colonel Wiener stressed most, and with justification, is the court-martial of Brigadier General Hull. At the trial itself, General Hull submitted a written request to the court-martial that he be allowed to appear with legally-qualified counsel, and that such counsel be allowed fully to participate in the proceedings as counsel for him. The written request specifically relied on the Sixth Amendment and invoked it as a right applicable to the court-martial proceedings. Military practice at that time permitted the accused to have counsel present with him at the trial, but the counsel was not allowed to participate in the proceedings; all counsel could do was to whisper in his client's ear and make recommendations as to what the client ought to do. In other words, counsel

<sup>21&</sup>lt;sub>2</sub> stat. 367 (1806).

could not participate. But this was specifically what General Hull requested that his counsel be allowed to do. The courtmartial refused the request. When President Madison reviewed the case, his action, dated 25 April 1814, reads as follows:

"The sentence of the court is approved, and the execution of it is remitted. [signed] James Madison." 22

Colonel Wiener's comments on President Madison's action in the Hull case are worth quoting in full. He wrote:

The circumstance that the draftsman and protagonist of the Federal Bill of Rights approved the proceedings in Hull's case, where the applicability of the sixth amendment had been expressly invoked, but in vain, is well nigh conclusive that Madison, like everyone else, never thought for a moment that its guarantee of counsel applied to military persons, or that its phrase "in all criminal prosecutions" which introduces the sixth amendment included military prosecutions. Under any other view, it would have been Madison's duty to disapprove the sentence. Madison read courts-martial carefully [here Colonel Wiener cites from Madison's letters], and did not hesitate to point out irregularities therein. is simply not possible to argue that his approval of the record in General Hull's case involved a failure to note a question so fully and explicitly raised at trial as the accused's written request for effective counsel. The Hull trial is thus perhaps the weightiest evidence of all, because it constitutes Madison's actual and practical construction of his Bill of Rights. 23

Colonel Wiener also cited similar actions by both John Quincy

Adams and James Monroe, as well as other similar actions by

Madison himself. 24 While Presidents Adams and Monroe were not

<sup>22</sup>Hull record of trial, appendix 119.

<sup>23</sup>wiener, <u>supra</u>, n. 15 at 45-46.

<sup>24</sup> Id. at 32-36, 46-47.

so intimately connected with the Bill of Rights as was Madison, they were familiar enough with the issues that their actions are relevant.

After analyzing the brief evidence which exists concerning the intent of the Framers concerning the application of the other portions of the Bill of Rights (in addition to the right to counsel), Colonel Wiener concluded that whenever a "right" found in the Bill of Rights was apparently applied in an early court-martial proceeding, that application was not made as a matter of constitutional right. Instead, the "right" was really the application of an old common-law principle which pre-dated the Constitution and which would in all likelihood have been continued to be applied in courts-martial, even if the Bill of Rights had never been written or adopted. However, a new "right" generated specifically by the Bill of Rights and unknown to the common-law--such as the trial by jury privilege--was uniformly not applied to court-martial cases in the early practice. Coupling this fact with the actual practices of (mainly) Madison in the right to counsel area, Colonel Wiener concluded that it was the intent of the Framers that the Bill of Rights not apply to trials by courtmartial.25

<sup>25</sup>To show that this unpalatable conclusion is simply that which he is forced to draw from the evidence, and that it does not necessarily represent his personal conviction, Colonel Wiener concludes his article by saying that, as other areas of the law have "grown" into the Constitution by the

while Colonel Wiener's conclusion may be unpalatable, the weight of the evidence he produced is overwhelmingly convincing. It is exceedingly difficult to explain the trend of the early American law which ensued (to be outlined immediately below), absent a complete acceptance of Colonel Wiener's thesis. As he pointed out, any other evaluation of the evidence results in "strained" reasoning, 26 in addition to being completely irreconcilable with what has actually transpired in this area. The trend of that actual practice follows.

# B. Developments in the Supreme Court of the United States

Colonel Wiener's analogy of the legal separateness of the military to the legal separateness of slaves is an interestingly appropriate analogy in another way, namely the fact that (absent a few cases dealing with collecting courtmartial fines or the jurisdiction of courts-martial<sup>27</sup>) appar-

change of time and circumstances, technology, and the like, he believes that the Bill of Rights should be held to apply to members of the Armed Forces, simply as an evolution of the law. He also makes the point that he believes that all of the Justices of the Supreme Court (except perhaps Justice Black) do not hold the understanding of the Framers to be a decisive factor in interpreting the Constitution.

<sup>&</sup>lt;sup>26</sup>wiener, <u>supra</u>, n. 15 at 291. The word "strained" is not a quotation but a summary of the discussion at this point in the article.

<sup>27</sup> See Wise v. Withers, 7 U.S. (3 Cranch.) 330 (1806) (suit in trespass against the collector of a fine levied by court-martial); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (same type of suit, but actually contesting the jurisdiction of the court-martial); Martin v. Mott, 25 U.S. (12 Wheat.) 19

ently no case involving a military man's rights was of sufficient concern to reach the Supreme Court until only a few years before the nation was to go to war over slavery.

The first such case was Dynes v. Hoover, decided in 1858. 28 Dynes was a sailor who sued the warden of the prison in which he was serving a sentence imposed by a Navy general court-martial, the suit alleging false imprisonment and assault and battery. The suit thus essentially alleged the wrongfulness of Dynes' confinement. The sentence of the courtmartial had been approved by the Secretary of the Navy, and the place of confinement had been properly designated by the Presi-In a unanimous opinion, the Court first looked to Congress' power under Article I "To make Rules for the Government and Regulation of the land and naval Forces." It then went on to say that Congress could lawfully wield that power "in the manner then and now practiced by civilized nations," and that since that manner recognized courts-martial, there was no requirement that the judicial system which Congress established pursuant to established customs and authority conform to the judicial system established by Article III of the Constitution; "indeed, . . . the two powers are entirely independent of each

<sup>(1827) (</sup>suit in replevin to recover a fine imposed by court-martial); and Ex Parte Watkins, 28 U.S. (3 Pet.) 193 (1830) (habeas corpus suit by a <u>civilian</u> employee of the Navy who had been tried and convicted of embezzlement of Navy funds by a <u>civilian</u> criminal proceeding).

<sup>2861</sup> U.S. (20 How.) 65 (1858).

other."<sup>29</sup> In essence, the Court ruled that the independence of the military system did not allow the Court to review judgments made within the proper scope of the military judicial system.<sup>30</sup> However, the Court did review all of the English cases where the civilian courts of that country had dealt with issues arising within the British military judicial system. Following those precedents, the Supreme Court ruled that it did have authority to look to whether the military tribunal had jurisdiction in the technical sense; whether the tribunal, being a creature of statute, was lawfully composed; and whether the tribunal had acted within its lawful powers, as granted by the statutes in question. Because in Dynes' case the Court found technical jurisdiction, lawful composition of the court, and a lawful sentence, Dynes was denied relief.

Dynes v. Hoover was the first case in which the Supreme Court considered the place of the court-martial in the constitutional scheme. Its principal rulings were (1) that the court-martial system as established by Congress is constitutional; (2) that the system is not required to be molded to Article III standards; and (3) that some limited review, as outlined above, was allowable in the civilian courts. These rules are still the law, even to this day. But it should be noted that Dynes

<sup>29</sup> Id. at 79.

<sup>30</sup> Accord, Decauter v. Paulding, 39 U.S. (14 Pet.) 497 (1840); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

never considered the constitutional issue of whether the Bill of Rights applied to court-martial proceedings.

Consistent with its ruling in <u>Dynes</u>, when a request for certiorari in a military case was made to the Supreme Court in <u>Ex Parte Vallandingham</u> in 1863, <sup>31</sup> the Court ruled that the concept of certiorari in the Article III judicial system was not applicable to decisions rendered by tribunals in the military judicial system, whether those tribunals were either a court-martial or a military commission. This principle also is still the law today, since Congress has not expanded the authority of the Supreme Court to direct certiorari of decisions rendered by the Court of Military Appeals, and since Article III itself gives the Supreme Court no jurisdiction in the military sphere. Again, the decision said nothing about the applicability—or the non-applicability—of the Bill of Rights to military courts—martial.

In 1867 came to the Supreme Court one of the most important cases of all in the military sphere, Ex Parte Milligan. 32 Mr. Milligan was a civilian resident of Indiana. He was literally dragged before a military commission convened by the Commander of the Military District of Indiana and charged and convicted of participating in a treasonable conspiracy against

<sup>3168</sup> U.S. (1 Wall.) 243 (1863).

<sup>3271</sup> U.S. (4 Wall.) 2 (1867).

the United States in favor of the Confederacy. A death sentence was approved by the President in May, 1865. At that point, Mr. Milligan sued in habeas corpus.

Using the test of jurisdiction, the Supreme Court found that Mr. Milligan was not subject to the jurisdiction of a military commission, since he was a civilian citizen of the United States, and since he was located in a place (the State of Indiana) where the Federal civilian courts were open and able to hear any case which the United States might have had against him. Accordingly, his petition for habeas corpus was granted. This was a somewhat curious result, however, since the Court seemingly ignored the fact that Mr. Milligan was charged with violating the laws of war and the fact that military tribunals, traditionally a military commission, were the proper forum in which such charges are tried.

Although the <u>Milligan</u> case cannot be said squarely to be a "military" decision, since Mr. Milligan was a civilian, the facts of necessity required the Court to discuss the role, power, and status of military tribunals and the standards applicable to them. Justice Davis, speaking for the Court, had the following to say about military tribunals:

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried in the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of a trial by jury. 33

It is interesting to note that, like the other cases discussed above, the majority opinion in <u>Milliqan</u> did not discuss the Bill of Rights in relation to military tribunals—although it must be admitted that it could be inferred from the preceding quotation that the Bill of Rights did not apply to courts—martial. However, Chief Justice Chase, concurring with Justice Davis' opinion, spoke the first words in a Supreme Court opinion concerning the Bill of Rights and the military. His words, although not part of the actual holding of <u>Ex Parte Milligan</u>, are the most oft-quoted words from the case:

Congress has power . . . to make rules for the government and regulation of the land and naval forces . . . .

It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Court to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger" are expressly exempted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a pre-

<sup>33</sup> Id. at 123.

sentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments as well as to the fifth.

Now we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the [sixth] amendment, and cases within those powers had been expressly excepted from its operation . . .

We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. 34

Thus by 1867 it appeared well-settled that Congress' power to create a court-martial system <u>not</u> subject to the standards of an Article III judicial system was within its constitutional powers, that no certiorari would lie from the decision of any military tribunal, and that the Bill of Rights did not apply to court-martial proceedings. Seemingly, there was nothing more to say.

However, it was noted above the <u>Dynes v. Hoover</u> did allow the civilian courts to look to the jurisdiction of courts—martial and to whether they had acted properly within the scope of their statutory powers. And, as shall be outlined below, this was to form the basis of review of courts—martial in the civilian courts for years to come, the review always being limited to "jurisdiction." Further, since the traditional means whereby the jurisdiction of any court was tested is through the writ of habeas corpus, it should not be surpris—

<sup>34</sup> Id. at 137-138.

ing to find that the principal technique which evolved was the suit in habeas corpus. This was the technical basis of the suit in <a href="Ex-Parte Milliqan">Ex-Parte Milliqan</a>; however, Mr. Milliqan was clearly a civilian. The trend which was to develop was the case where the petitioner in habeas corpus was a person admittedly subject to court-martial jurisdiction.

The first such suit was initiated by a man named Reed. Reed was a clerk to a paymaster on board ship in the service of the Navy. It is not clear whether Reed's contract of employment made him a serviceman in the Navy or whether he was a civilian employee actually working on board a ship; however, the issue is immaterial because as part of his contract of employment, Reed signed a document agreeing to be bound by the Articles for the Government of the Navy and to be amenable to trial by court-martial. And he was indeed tried by courtmartial for malfeasance of his duties, was convicted, and was sentenced. The military reviewing authority, however, did not think that the sentence initially imposed by the court-martial was "adequate" (that is, severe enough); so he returned the case to the same court-martial for "reconsideration" of its sentence. Naturally the court "reconsidered" and imposed a stiffer sentence. Accordingly, Reed sued for habeas corpus. 35

In deciding the case, the Supreme Court first noted that the case was one where the court-martial clearly had jurisdiction over the person who had been tried and convicted by

<sup>35</sup>Ex Parte Reed, 100 U.S. 13 (1879).

the court-martial in question (unlike Ex Parte Milligan, where the principal holding of the Court was that the court-martial did not have jurisdiction because Mr. Milligan was a civilian who was not amenable to trial by court-martial). But the Court went on to determine whether the reviewing authority and the court-martial had exceeded their statutory authority by (essentially) increasing the sentence. The Court found that the procedures used were specifically authorized by the Navy Regulations for the Administration of Law and Justice, which regulation the Court ruled had the force and effect of law. Thus finding both jurisdiction over the person and lawful authority for the procedures used, the Court denied Reed's application for habeas corpus.

The importance of Ex Parte Reed, however, is that it firmly established the suit for a writ of habeas corpus as the primary means whereby court-martial verdicts could be collaterally reviewed in the civilian courts. Therefore, although no formal "review" of courts-martial (or certiorari) was permissible, the door to the civilian courts was not completely closed. Second, Ex Parte Reed shows the Supreme Court using the standards of review--technical jurisdiction and statutory power--enunciated in Dynes v. Hoover (which was not technically a habeas corpus case) in an actual habeas corpus case where the petitioner was actually amenable to court-martial jurisdiction.

But there were other cases as well.

In 1883, the Supreme Court decided the case of Keyes

y. United States. 36 Keyes was an Army second lieutenant who

was tried by court-martial (the report does not say what the

nature of the charges was). He initially pleaded not guilty,

but after some evidence was adduced against him, he changed

his plea to guilty. He was convicted and sentenced to be dis
missed. Later, after actually being dismissed, he brought suit

in the Court of Claims for back pay, with one of his theories

being that because one officer was an accuser, witness, and a

member of the court (that is, the military equivalent to a

jury member), the proceedings were legally void. He argued

that void proceedings deprived the court-martial of jurisdic
tion. The Supreme Court, however, found that

there is no statute or regulation which forbids what was done in this case. [Further, t]hat the courtmartial . . . had jurisdiction of the person of the appellant is not disputable. That being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be valid when it is questioned in this collateral way. 37

clearly for one military officer to be accuser, witness, and a member of the jury in the same criminal case violates the Constitution. To call such proceedings "mere error" or "irregularity" which, since not forbidden by statute, would not form the basis for relief, demonstrates clearly that Mr. Chief

<sup>36&</sup>lt;sub>109</sub> U.S. 336 (1883).

<sup>37</sup> Id. at 340.

Justice Chase's dictum in <a href="Ex Parte Milligan">Ex Parte Milligan</a> was indeed the law of the land--that no part of the Bill of Rights applied to trials by court-martial.

During the next few years after <u>Keyes</u>, the Court decided all cases 38 which came before it in essentially the same manner. It looked only to jurisdiction and to statutory power. It refused to pass on any allegations of error or irregularity. That is not to say that all of the Court's decisions were adverse, however. For example, in the case of <u>Runkle v. United States</u>, 39 the Court granted Major Runkle's request for back pay because it found that his court-martial sentence to dismissal had never been approved in the particular way which Congress had required in cases involving officers, as specified in the then-current Articles of War.

Then in 1890 the Court decided the case of <u>In re Grimley</u>. 40 Grimley had re-enlisted in the Army at an age over that authorized by Army regulations. After his re-enlistment, Grimley must have become less enchanted with the Army than when he re-enlisted, because he hied himself away. After his capture and conviction as a deserter, he sued in habeas corpus on the theory that his over-age re-enlistment deprived the Army of jurisdiction over him.

<sup>38</sup>smith v. Whitney, 116 U.S. 167 (1886); Kuntz v. Moffatt, 115 U.S. 487 (1885); Whales v. Whitney, 114 U.S. 564 (1885); Ex Parte Mason, 105 U.S. 696 (1881).

<sup>&</sup>lt;sup>39</sup>122 U.S. 543 (1887).

<sup>40&</sup>lt;sub>137</sub> U.S. 147 (1890).

The Court disagreed. In doing so, however, the Court also appeared to narrow the Dynes v. Hoover scope of review. The Court held that Grimley's over-age re-enlistment constituted a contract which was voidable at the option of the Army, but which was not void. That gave the Army the right to back out, but as to Grimley the contract changed his status the same as "getting married," and he could not back out. But the Court went further than merely holding that Grimley was properly a member of the Army and therefore subject to the jurisdiction of the court-martial which tried and convicted him. The Court said that in traditional habeas corpus cases arising in the civilian sphere, the courts merely looked to jurisdiction, and that no correcting power over the proceedings or any irregularities therein could be had by habeas corpus. The Court concluded with its oft-quoted statement that "The single inquiry, the test, is jurisdiction." 41

In addition, the Court articulated most clearly for the first time a "hands-off" attitude towards the military. The opinion expressed it thusly:

While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right of command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence

<sup>41</sup> Id. at 150.

among the soldiers in one another are impaired if any question is left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed.<sup>42</sup>

If it is not clear already, it should be stressed that errors in the proceedings of a court-martial were not an "inherent vice" of the kind which the Court spoke of in In re Grimley which would justify granting relief to a military accused. In case after case for almost sixty years following In re Grimley, the Court simply repeated its old formula that it would look only to jurisdiction. 43 When Dynes v. Hoover, Ex Parte Milligan, Ex Parte Reed, Keyes v. United States, and In re Grimley are considered in concert, there is no doubt left that in 1890 (the date of <u>In re Grimley</u>) -- a century after the adoption of the Bill of Rights -- the Supreme Court's position was that courts-martial were not Article III courts and that the Bill of Rights did not apply to their proceedings. Indeed, Mr. Chief Justice Chase's dictum in Milligan in 1867 was "It has been so understood and exercised from the adoption of this Court to the present time."44 Thus there is sound and weighty evi-

<sup>42</sup> Id. at 153.

<sup>43</sup> In re Yamashita, 327 U.S. 1 (1946); Kahn v. Anderson, 255 U.S. 1 (1921); Reaves v. Ainsworth, 219 U.S. 296 (1911); Mullan v. United States, 212 U.S. 516 (1909); Swaim v. United States, 165 U.S. 553 (1897); Johnson v. Sayre, 158 U.S. 109 (1895); United States v. Fletcher, 148 U.S. 84 (1893).

<sup>4471</sup> U.S. at 137.

dence in Supreme Court practice, in addition to executive practice as outlined by Colonel Wiener, that the original understanding was that the Bill of Rights did not in fact and never was intended to apply to courts-martial.

martial by the <u>Dynes v. Hoover</u> tests, even though <u>In re Grimlev</u> might indicate it was not willing to do even that. Thus--al-though it rejected his contentions in both cases--the Supreme Court did look carefully and in detail into the allegations of the persistent Captain Oberlin M. Carter<sup>45</sup> that the court-martial which convicted him had exceeded its statutory powers. Notwithstanding, it is fair to say that the Court was not overly liberal in its treatment of military cases before its bar. Indeed, it was not until after World War II that there appeared to be any crack in the seemingly impenetrable wall built of stones labelled "jurisdiction," "statutory power," "separate legal systems," "nonreviewability," "mere error," and "hands-off."

As a preliminary to the developments which were to occur in the 1950's, a few Supreme Court decisions were more or less a prelude.

First there was the 1938 decision in Johnson v. Zerbst. 46

<sup>45</sup>Carter v. McClaughry, 183 U.S. 365 (1902); Carter v. Roberts, 177 U.S. 496 (1900).

<sup>46304</sup> U.S. 458 (1938).

Although not a military case, 47 the case established the principle that when a constitutional norm made applicable to the States through the operation of the Fourteenth Amendment was violated in a State court proceeding, upon a petition in habeas corpus to the Federal courts, the Federal courts could grant the writ. The rationale was that the violation of a constitutional norm, particularly those contained in the Bill of Rights (insofar as they applied to the States), deprived the State court of "jurisdiction." The expansion of the concept of jurisdiction to mean something more than mere authority over the person and the subject matter neatly fitted the whole problem into the area of habeas corpus -- since in the civilian sphere as well as in the military, the traditional inquiry in habeas corpus cases had been whether the court in question had jurisdiction in the classic sense. The upshot of the legal theory allowed rights protected by the Bill of Rights to be vindicated through the means of a suit in habeas corpus. Since the Supreme Court had long held that the only way in which a courtmartial conviction could be brought before the civilian courts was through a petition for a writ of habeas corpus, would the Court extend its inquiry in military cases, similar to the way it did in Johnson v. Zerbst?

<sup>47</sup>Oddly enough, both Johnson and his co-accused were members of the United States Marines on leave when the offense was committed which led to their arrest, trial, and conviction by State authorities.

The first important military case concerning a constitutional issue to reach the Supreme Court after Johnson v. Zerbst was the 1949 case of Wade v. Hunter. 48 It did not turn on a Johnson v. Zerbst formulation, however. Wade had been tried by a court-martial convened in Germany during actual fighting. His initial trial had been stopped because of the tactical situation, although it had proceeded past arraignment, which is the point in a trial where jeopardy is said to "attach." At a later time, a second trial was conducted, at which Wade was convicted and sentenced. Wade challenged the second trial as lacking jurisdiction because it amounted to placing him in double jeopardy. Thus he petitioned for habeas corpus. Although the Supreme Court denied issuance of the writ (with three Justices dissenting), the majority's theory was that the test for determining the validity of second trials had always been whether the first trial was wrongfully terminated. The majority of the Court accepted the military commander's determination that the tactical situation demanded discontinuance of the first trial. Accordingly, that stoppage was not legal error, and the second trial could lawfully commence and return a verdict and sentence.

The important thing about <u>Wade v. Hunter</u> from a constitutional development point of view is that the Court did

<sup>&</sup>lt;sup>48</sup>336 U.S. 684 (1949).

not merely ask its traditional questions of whether the courtmartial had jurisdiction and whether it had acted within its

own statutory authority, or had committed "mere error." It

really just ignored the jurisdiction question and, in essence,

it assumed (without actually saying so, however) that the issue

before it was whether the constitutional privilege against

double jeopardy had been violated.

However, in the very next year, 1950, the Court simply returned to its traditional jurisdictional approach and denied habeas corpus in <u>Hiatt v. Brown</u>. 49 It even quoted (in <u>Hiatt</u>) the sentence from <u>In re Grimley</u> that "The single inquiry, the test, is jurisdiction." 50 Furthermore, it simply did not mention the impact of <u>Johnson v. Zerbst</u> on the issue of jurisdiction. Also, <u>Hiatt v. Brown</u> is a particularly important case because of the theory of decision in the lower court. That court 51 had fully analyzed the entire proceedings of the courtmartial and determined that the Government had failed to comply with certain provisions of the Articles of War in constituting the court-martial. The Fifth Circuit ruled that this deprived the court-martial of jurisdiction. In addition, the circuit court ruled that there were so many errors committed

<sup>&</sup>lt;sup>49</sup>339 U.S. 103 (1950).

<sup>&</sup>lt;sup>50</sup>Id. at 111.

<sup>51&</sup>lt;sub>175</sub> F.2d 273 (2d Cir. 1949).

during the trial itself that their cumulative effect was that the accused did not receive a fair trial. This, to the circuit court, amounted to a denial of due process in violation of the Fifth Amendment. Notwithstanding, the Supreme Court only looked to the simple issue of jurisdiction in the classic sense; and its refusal to say that errors in the proceedings of a constitutional magnitude deprived the court-martial of jurisdiction (the Johnson v. Zerbst theory), or that the errors themselves justified reversal because courts-martial were directly subject to the due process provisions of the Fifth Amendment, clearly indicated a continuation of the "old" views. Any possible argument that Wade v. Hunter represented the beginning of a new day seemed to be unwarranted.

In addition, the Court followed and made even more restrictive its traditional approach in two other cases in the early 1950's. <u>Gusik v. Schilder<sup>52</sup></u> was a suit in habeas corpus upon a murder conviction by court-martial. The Government interposed the provisions of the 1920 Articles of War (now Article 76 of the Uniform Code of Military Justice<sup>53</sup>), which made

<sup>52&</sup>lt;sub>340</sub> U.S. 128 (1950).

<sup>53 &</sup>quot;Article 76. Finality of proceedings, findings, and sentences.

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentence by courts-martial following approval, review, or affirmation as required by this chapter,

court-martial proceedings and judgments "final and binding" on all other Government departments and agencies, and on all courts of the United States. This provision was new in the 1920 Articles of War, and prior to Gusik v. Schilder it had not been raised in any Supreme Court case. The Court refused to accept the Government's argument that this act of Congress "cut off" altogether the right of habeas corpus in the civilian courts in military cases; but the Court did rule that the new "finality" provisions of the Articles of War did require a military man seeking habeas corpus finally to exhaust his military remedies so that his case would indeed be "final" (within the meaning of the statute), prior to his being eligible to seek relief in habeas corpus from the civilian courts.

In Orloff v. Willoughby 54 in 1953, the Supreme Court refused to release a medical doctor from the military because, although the doctor had been inducted under the so-called "doctor's draft," he was not commissioned as he alleged the statute establishing the special draft required. In language somewhat reminiscent of In re Grimley, 55 the Supreme Court

are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in . . . article 73 . . . and to action by the Secretary concerned as provided in . . . article 74 . . ., and the authority of the President.

<sup>54345</sup> U.S. 83 (1953).

<sup>55&</sup>lt;sub>See supra</sub>, n. 42.

said that

The military constitute a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service. 56

It is important to note that Orloff did not necessarily introduce a completely new concept into the Supreme Court's treatment of military cases. As noted earlier, the language quoted above is evocative of that in In re Grimley, an 1890 case. In addition, the principle that the courts would not intervene in the actual operations of the military goes back even further. For example, in the 1840 case of Decatur v.

Paulding, 57 a Navy officer's widow sued for a more liberal pension authorized under one particular act of Congress, rather than take the less remunerative pension which the Secretary of the Navy had awarded her under another act of Congress. The Supreme Court refused to intervene, on the theory that it had no authority to review "executive decisions." The 1842 case of United States v. Eliason 58 followed essentially the

<sup>56345</sup> U.S. at 94.

<sup>&</sup>lt;sup>57</sup>39 U.S. (14 Pet.) 497 (1840).

<sup>&</sup>lt;sup>58</sup>41 U.S. (16 Pet.) 291 (1842).

same theory. There the debate was over the interpretation of a particular act of Congress. The Secretary of the Army had interpreted the statute in a fashion which cut off certain monetary rights which Eliason claimed were due him. Again the Court refused to question the executive interpretation, holding it to be a decision "of the executive and as such . . . binding upon all within the sphere of his legal and constitutional authority." 59

Notwithstanding this long history of nonintervention,
Justices Black, Frankfurter, and Douglas dissented in Orloff
v. Willoughby. Their theory was that the Court would not be
"intervening" if it gave Dr. Orloff relief; instead, these
Justices dissented on the theory that the act of Congress
there involved did require the Army to commission Dr. Orloff,
just as Dr. Orloff claimed. When the Army did not do so,
these Justices thought that the Army exceeded its statutory
powers and therefore forfeited the right to retain Dr. Orloff
in the military service. In essence, they held he either had
to be commissioned or discharged.

Again looking at these events from a constitutional standpoint, it appeared that perhaps <u>Wade v. Hunter</u> was the beginning of something rather revolutionary—a recognition by the Supreme Court that servicemen had constitutional rights

<sup>&</sup>lt;sup>59</sup>Id. at 302.

which the civilian courts would vindicate through the means of habeas corpus. If this were so, Chief Justice Chase's comment in Ex Parte Milligan that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment" would at last be overruled. However, when the lower court in Hiatt v. Brown had in effect applied civilian due process norms to a court-martial and the Supreme Court not only reversed but said that the only test was jurisdiction; and when Orloff v. Willoughby apparently returned to the technical jurisdiction test, plus firmly articulating a strict "hands-off" theory; any gains seemingly made by Wade v. Hunter appeared to vanish.

However, the period of the early 1950's was a period of general constitutional advancement on a number of fronts. Thus it is not necessarily out of keeping with that general liberalizing trend that the Supreme Court should decide, in 1953—the same year as the Orloff decision—Burns v. Wilson. 61 Burns had been tried by a court—martial for murder and rape, convicted, and sentenced. His case was "final," having been through the entire military appellate process. He alleged that he had been denied due process (on several counts), and

<sup>6071</sup> U.S. at 138.

<sup>61346</sup> U.S. 137, petition for rehearing denied, 346 U.S. 844 (1953).

that this denial warranted his release from prison. Although the Supreme Court denied issuance of the writ of habeas corpus, and although the decision in the case is, at best, extremely confusing (mainly because there is no "opinion of the Court" as such but only a plurality opinion plus a number of other opinions by other Justices), notwithstanding, the importance of <u>Burns v. Wilson</u> as a milestone in military constitutional development cannot be overstated.

The principal plurality opinion in <u>Burns</u> was written by Chief Justice Vinson, with whom Justices Reed, Burton, and Clark joined. Justice Jackson concurred in the result, without separate opinion. First the Chief Justice discussed the Court's authority to hear military habeas corpus cases. He noted that the statute authorizing the civilian courts to hear habeas corpus cases was general—that is, it applied by its terms to any habeas corpus petition, regardless of the tribunal or other Government action which formed the basis for the petition. End and scope of habeas corpus review of military cases to be the same as those for civilian habeas corpus cases; however, this the Chief Justice did not do. He ruled that the <u>scope</u> of review to be given military habeas corpus cases was required to be more narrow than that given a civil—

<sup>62</sup>The current habeas corpus statute still reads the same as in 1953; 28 U.S.C. § 2241 (1970).

ian case. Therefore, the plurality opinion refused to apply Johnson v. Zerbst to military cases and to hold that if a constitutional norm was violated in a military case, the military tribunal would be deprived of its jurisdiction. Instead, the Chief Justice ruled that its "narrow" authority to review military cases extended only to the question of whether the military courts had heard and adjudicated any constitutional issues raised -- in addition, of course, to the traditional scope of review which had been announced in all the Court's prior decisions in military habeas corpus cases. As to the constitutional issue, however, if the military courts did give "full and fair consideration" to the constitutional claims made, then consistent with past cases, the civilian courts could not review the evidence which led the military courts to whatever conclusion they reached. Finally, the plurality opinion reaffirmed the Gusik v. Schilder rule that a military accused must first exhaust his military remedies before he could petition the civilian courts for habeas corpus. It also affirmed Gusik's holding that the "finality" provisions of Article 76 of the Uniform Code of Military Justice would not "cut off" habeas corpus power in the civilian courts.

Justices Black and Douglas dissented. They would have applied <u>Johnson v. Zerbst</u> to courts-martial, and they expressly stated that in their view, the full protections of the Bill of Rights apply to servicemen, except to the extent that they

are either expressly or by necessary implication inapplicable. The constitutional issue before the Court in <u>Burns</u> was the privilege against self-incrimination (among others); and as <u>Justices</u> Black and Douglas found the Fifth Amendment's self-incrimination provisions applicable to servicemen, and that the protections afforded thereby had been violated in Burns' case, they would have granted the writ.

Justice Frankfurter ultimately said that he wanted more facts and more time to consider those facts before he made a firm decision. However, in discussing the issues as he saw them, and in stating the issues as he desired them to be developed in further argument and decision by the Court, he seems to have "hit the nail on the head"—and, in so doing, he also seems to have disclosed his views on what he thought the outcome of the issues involved should be:

Later, when Burns v. Wilson was denied reconsideration,

<sup>63346</sup> U.S. at 149.

Justice Frankfurter made the following additional remarks:

If the main opinion stands, matters which are open for collateral attack upon a judgment of conviction entered in a United States District Court, a constitutional tribunal, will be foreclosed from inquiry when the judgment of conviction collaterally assaulted is that of a court-martial, an executive tribunal of limited jurisdiction ad hoc in nature. 64 [After citing Johnson v. Zerbst, Justice Frankfurter went on to say:] . . . [I]f a denial of due process deprives a civil body of "jurisdiction," is not a military body equally without "jurisdiction" when it makes such a denial, whatever the requirements of due process in the particular circumstances may be?65

From the foregoing language, the direction in which

Justice Frankfurter was heading is clear. One could only

wish that reconsideration of <u>Burns v. Wilson</u> had been granted

and that the Court had actually met the issues which Justice

Frankfurter saw.

Justice Minton concurred in a separate opinion, but the reason that he would not grant the writ was based on the old view that the only question was jurisdiction. As to a service-man's rights under the Bill of Rights, those to Justice Minton "are committed by the Constitution and by Congress acting in pursuance thereof to the protection of the military courts." 66

The confusion in the lower courts which has resulted from this array of views, and from the fact that Justice Frank-

<sup>64</sup> Id. at 844.

<sup>65</sup> Id. at 848.

<sup>66</sup> Id. at 146 (footnotes omitted).

furter's questions were not answered by the Court--then or since--has resulted in near chaos, which will be reviewed in the following section. 67 However, it seems fair to say that if Burns stands for anything, it stands for a clear-cut holding that the Bill of Rights applies to servicemen. This does not mean that courts-martial are to be equated to Article III courts. But only by saying that the Bill of Rights applies could there be any issue of "constitutional magnitude" for the military courts to give "full and fair consideration" to. Clearly Justices Black and Douglas held that the protections of the Bill of Rights apply to servicemen before military tribunals, to the fullest extent possible. And Justice Frankfurter had no doubt that the military courts are "not freed from the requirements of due process of the Fifth Amendment."68 Thus it was only Justice Minton who would apparently hold that, since the Bill of Rights did not apply to servicemen, the sole issue before the civilian courts would be the issue of technical jurisdiction, and that a serviceman's "rights" would be only those which Congress gave and the military courts enforced.

The Supreme Court has not actually reconsidered its

Burns decision in any subsequent case. In addition, the con-

<sup>67</sup>For judicial commentary on the confusion generated to date by Burns v. Wilson, see Allen v. VanCantfort, 436 F.2d 625, 629-630 (1st Cir. 1971).

<sup>68346</sup> U.S. at 149.

fusion resulting from Burns itself was not markedly assisted by the companion case decisions in Jackson v. Taylor 9 and Fowler v. Wilkinson, 70 both decided in 1957. These cases did not actually involve an issue within the purview of the Bill of Rights, but instead each went back to the Dynes v. Hoover inquiry concerning whether the military tribunals had acted within their statutory power. Specifically, the question revolved around whether the intermediate military appellate court could modify the sentence in these cases, when it found that part of the verdict of the court-martial was invalid and must be set aside. While the rationale in these cases seems fairly clear, it somehow confused the Fifth Circuit Court of Appeals in the 1963 case of Williams v. Heritage, 71 so that the court ruled that Jackson and Fowler indicated a repudiation by the Supreme Court of its Burns v. Wilson ruling, and a return to the old "jurisdiction only" test. (However, the Fifth Circuit seems to have forgotten its <u>Williams v. Heritage</u> opinion in later cases. 72) Other than this one difficulty--which if it ever really was a difficulty now appears moot--the <u>Jackson</u> and <u>Fowler</u> cases really

<sup>69353</sup> U.S. 569 (1957).

<sup>70&</sup>lt;sub>353</sub> U.S. 583 (1957).

<sup>71323</sup> F.2d 731 (5th Cir. 1963).

<sup>72</sup> See Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965).

add nothing to the development of constitutional principles as they apply to the military, and indeed they appear to be technically correct decisions—at least from the standpoint of traditional military practice. 73

The closest the Supreme Court has come to "reconsidering" its <u>Burns</u> opinion is perhaps in its decision in the cases of <u>United States v. Augenblick and Juhl</u>. Augenblick was a Navy officer who was tried and convicted by general courtmartial and sentenced to be dismissed from the Navy. He sued in the Court of Claims for back pay on the theory that part of the evidence against him was admitted in violation of law (the Jencks Act). Juhl was an enlisted serviceman who was convicted of what amounted to black marketing with Post Exchange merchandise. He was sentenced to punishments short of discharge, and of a sort which did not permit review by the Court of Military Appeals. He sued in the Court of Claims for back pay on the theory that the evidence against him was admitted in violation of the rules of evidence concerning accomplices' testimony. The cases were consolidated in the Supreme Court.

A threshold question in each case was whether a suit for back pay was barred by the finality provisions of Article

<sup>73&</sup>lt;u>Cf.</u> DeCoster v. Madigan, 223 F.2d 906 (7th Cir. 1955). The court in DeCoster reached exactly the opposite conclusion on exactly the same issue which was before the Supreme Court in the <u>Jackson</u> and <u>Fowler</u> cases (<u>supra</u>, nn. 68-69).

<sup>74393</sup> U.S. 348 (1969).

76 of the Uniform Code or whether, like habeas corpus, back pay suits in the Court of Claims could still lie. Augenblick and Juhl argued that in neither of their cases would a petition for habeas corpus be permissible, since Augenblick had only been sentenced to dismissal and since Juhl's sentence to confinement had run before he initiated any legal action at all. The Court of Claims had ruled on this point that when habeas corpus would not lie, it could accept a suit for back pay. The Supreme Court said

[E]ven if we assume, <u>arguendo</u>, that a collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a "constitutional" defect in the military decision, these present cases on their facts do not rise to that level. 75

This ruling obviously also disposed of the major claim made by each petitioner. By ruling that the claim made by each petitioner concerning the issue of the admissibility or inadmissibility of certain evidence was not a question in either case which rose to a "constitutional level," the Supreme Court denied the requests for relief.

While this outcome from the petitioners' points of view was obviously unsatisfactory and negative, the decision in <a href="Mugenblick and Juhl">Augenblick and Juhl</a> seems only to affirm the view that <a href="Burns">Burns</a> means that issues which <a href="mailto:are">are</a> of a "constitutional level" can form the basis for intervention by the civilian courts. In-

<sup>75</sup> Id. at 351-352.

deed, the tone of Augenblick and Juhl even suggests that the civilian courts can apply the rationale of Johnson v. Zerbst to courts-martial--again, when the issues rise to a "constitutional level." On the impact of Article 76 of the Uniform Code, Augenblick and Juhl appears to state a preference for suits in habeas corpus -- if, of course, the legal posture of the case would permit such a suit. However, when the legal posture of the case would not permit a suit in habeas corpus (as in Augenblick and Juhl), it also appears that the Supreme Court will not cut off entirely perhaps the only route of access to the civilian courts which the individual concerned might have, whether that route be a suit in the Court of Claims for back pay, or perhaps a suit for injunction or mandamus. Examples of these other types of suits will be indicated in another section of this discussion, which will follow shortly. But the point to be made here is that the total impact of Augenblick and Juhl is that, subject to certain conditions such as the exhaustion of military remedies and the involvement of a question rising to a "constitutional level," one way or another the civilian courts will be open to servicemen and former servicemen to adjudicate claims arising within the military.

It must be stressed, however, that all this is not to say that courts-martial are now to be considered Article III courts; they are not. There is nothing in either <u>Burns</u> or

Augenblick and Juhl which would overturn Dynes v. Hoover's 1858 ruling that although the court-martial system is constitutional, courts-martial are not Article III courts and are not required to meet all the norms applicable to Article III courts. What Burns and Augenblick and Juhl do hold is that courts-martial must apply those portions of the Bill of Rights which can be applied, to the extent that they are neither expressly inapplicable or inapplicable by necessary implication.

Before turning to a survey of how well actual vindication of these rights has fared in other Federal courts, a number of critical decisions by the Supreme Court concerning the jurisdiction of courts-martial should be mentioned.

Article 2(11) of the Uniform Code of Military Justice confers jurisdiction to courts-martial over civilian "persons serving with, employed by, or accompanying the armed forces outside the United States" and its Territories. Beginning with the case of <u>United States ex rel. Toth v. Quarles</u> in 1955, and continuing through <u>Relford v. Commandant</u>, <u>United States Disciplinary Barracks</u> in 1971, 76 the Supreme Court has,

<sup>76</sup>McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). For a discussion of this problem, see Bishop, Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists and Discharged Prisoners, 112 U. Pa. L. Rev. 317 (1964). Relford v. Commandant, United States Disciplinary Barracks, 401 U.S. 355 (1971); O'Callahan

in essence, held that Article 2(11) is unconstitutional.

Further, although not entirely clear, it appears to have limited court-martial jurisdiction over servicemen themselves to

"service connected" offenses and (probably) offenses committed outside the United States and its Territories. Again, although not completely clear, it appears that the rationale which the Court has used in reaching these decisions is that since courts-martial do not meet Article III standards, court-martial juris-diction will not be extended beyond persons actually "in" the Armed Forces, 77 and even then jurisdiction will be limited to "service connected" offenses and (probably) to offenses committed outside the United States and its Territories. 78

In discussing their views of why courts-martial are not a legally satisfactory substitute for an Article III court, the Justices have of necessity expressed their views of the true nature of a court-martial. Justice Black wrote the principal opinion in both <u>Toth</u> and <u>Reid v. Covert</u>. Although worded slightly differently, he says essentially the same thing in each case. Further, when Justice Douglas wrote the opinion

v. Parker, 395 U.S. 258 (1969). For a complete listing of all Court of Military Appeals cases dealing with the O'Callahan decision, plus a list of commentary of the problem, see the Relford decision.

<sup>77</sup> See, e.q., Reid v. Covert and United States ex rel. Toth v. Quarles, both supra, n. 76.

<sup>78</sup> See Relford v. Commandant, United States Disciplinary Barracks and O'Callahan v. Parker, both supra n. 76.

of the Court in O'Callahan v. Parker, he quoted the following passage from Toth:

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courtsmartial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

Moreover, there is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to

perform this task. This idea is inherent in the institution of trial by jury. 79

In addition to the foregoing passage, Justice Black's elaborations in Reid v. Covert appear to paint an even blacker picture of courts-martial, from a constitutional standpoint. Beginning by saying that "Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks, "80 Justice Black discusses "command influence" as an almost certain result of the nature of things, and the harshness of military law, in that "It emphasizes the iron hand of discipline more than it does the even scales of justice."81 Although he concedes that the reforms of the 1950 Uniform Code of Military Justice are good, and he again concedes that military personnel are honest and have a high sense of justice, he worries that the reforms are merely statutory and authorize an unacceptable degree of the blending of executive, legislative, and judicial functions in the President as Commander-in-Chief. He concludes that he believes that courts-martial are simply not capable of vindicating constitutional rights, and that "As yet it has not been clearly settled to what extent the Bill of Rights and other

<sup>79350</sup> U.S. at 17-18. Quoted 395 U.S. at 262-263.

<sup>80354</sup> U.S. at 35-36.

<sup>81</sup> Id. at 38.

protective parts of the Constitution apply to military trials."82

These comments by Justice Black and the repetition of part of them in O'Callahan by Justice Douglas are interesting when compared with the fact that these two Justices dissented in Burns v. Wilson in 1953 and would have granted the writ of habeas corpus to Burns because his constitutional rights were not fully vindicated in his military court-martial or in the military appellate process.83 In Burns these two Justices specifically stated that they believed courts-martial to be subject to all those parts of the Bill of Rights not expressly inapplicable or not inapplicable by necessary implication. Because the constitutional privilege at stake in Burns was violated in their view, and because it (the privilege against self-incrimination in the Fifth Amendment) is neither expressly nor by necessary implication inapplicable to military trials, the two Justices dissented and would have granted the writ of habeas corpus to Burns.

It is submitted that the different nature of the issues in the cases here involved explains the difference between Justices Black's and Douglas' dissent in <u>Burns</u> and their opinions in <u>Toth v. Quarles</u>, <u>Reid v. Covert</u>, and <u>O'Callahan v. Parker</u>. To insure that civilians are tried in Article III

<sup>82</sup> Id. at 37.

<sup>83346</sup> U.S. at 150-154.

courts, and to insure that even servicemen are also tried in Article III courts whenever possible, it was necessary to "load the issue" in the jurisdiction cases, so to speak. By making courts-martial look constitutionally "bad" in those cases, it was easier to say that the competing military interests (which admittedly have genuine weight) should not prevail, and that court-martial jurisdiction should be limited and withdrawn in those cases. However, in a case like <u>Burns</u>, where there was clearly a proper exercise of military jurisdiction, Justices Black and Douglas wanted to insure that the safeguards of the Bill of Rights are applied to courts-martial to the fullest extent possible.

Accordingly, the dire statements in <u>Toth v. Quarles</u> and <u>Reid v. Covert</u> should not be taken as diminishing to any extent the apparent theory of the Supreme Court announced in <u>Burns v. Wilson</u> and affirmed (albeit tacitly) in <u>United States v. Augenblick and Juhl.</u> To whatever extent the Bill of Rights can be applied to the military establishment, these cases show that the Supreme Court will do so. Indeed, in a perverse sort of way, <u>O'Callahan v. Parker</u> could even be said to buttress this view, since the limitations imposed on court-martial jurisdiction in that case were imposed lest the Fifth Amendment's exception of courts-martial "be <u>expanded</u> to deprive every member of the armed services of the benefits of an indictment by grand jury and a trial by a jury of his peers." To whatever

<sup>84395</sup> U.S. at 273.

extent it is necessary to deprive members of the Armed Forces of the full protections of the Bill of Rights, the Court will uphold the court-martial system and the power of military commanders as constitutional; but to whatever extent the privileges and protections of the Bill of Rights can be applied to a serviceman when he is brought before a court-martial, the Supreme Court will always opt to apply the Constitution as fully as possible.

At last it appears safe to say that Chief Justice Chase's dictum in <a href="Ex-Parte Milligan">Ex-Parte Milligan</a> is not the law.

- C. Developments in Other Federal Courts
  - 1. The United States Court of Military Appeals

In 1950, when Congress enacted the Uniform Code of Military Justice, Article 67(a) thereof established for the first time in American military jurisprudence a formal appellate court not under the control of the military departments themselves. The first session of the Court of Military Appeals convened at the October term, 1951, since the Uniform Code did not become effective until directed to be implemented by Executive Order on 31 May 1951. In view of the rule in Gusik v. Schilder that a serviceman must exhaust fully his remedies within the military sphere before his case can be heard in habeas corpus by the Federal civilian courts, and in

<sup>85</sup> Exec. Order No. 10,214, 3 C.F.R. 408-731 (Supp. 1953).

view of the fact that <u>Burns v. Wilson</u> reaffirmed that rule and added the requirement that the Federal civilian courts could not consider constitutional issues in military cases unless the military tribunals had failed to give "full and fair consideration" to any such constitutional issues involved, the position taken by the highest court in the military judicial system is critical to an analysis of exactly what constitutional rights a member of the Armed Forces actually has.

Prior to the decision in <u>Burns v. Wilson</u> in 1953, the Court of Military Appeals decided two cases which directly raised constitutional questions.

The first of these cases was <u>United States v. Clay</u>. 86

The constitutional issue in <u>Clay</u> was whether certain procedures at courts-martial constituted due process. In a unanimous opinion written by Judge Latimer, the court first defined "due process" as "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. 87 The critical issue, therefore, was the source of those "rules and principles"—the Constitution, or something else? In deciding this critical issue, the court delineated a special kind of due process which it called "mili-

<sup>861</sup> U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

<sup>871</sup> U.S.C.M.A. at 77, 1 C.M.R. at 77.

tary due process" and which it defined as follows:

For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom [the] rights and privileges [of military due process] on the Constitution. We base them on the laws as enacted by Congress. But this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes. 88 [Accordingly, we will interpret the rights granted to military personnel by Congress by civilian federal standards,] aside from the constitutional due process concept threading its way through federal cases. 89

Similarly, in the second case, <u>United States v. Welch</u>, <sup>90</sup> the issue was whether the privilege against self-incrimination had been violated. The court found that it had, and reversed the conviction; however, the court's reasoning was that the facts showed a violation of Article 31, Uniform Code of Military Justice (which states the privilege against self-incrimination), and not a violation of the Constitution. Chief Judge Quinn, speaking for the court with Judge Brosman joining him, said "Military due process requires that courts-martial be conducted not in violation of those constitutional safeguards which Congress has seen fit to accord to members of the Armed Forces." <sup>91</sup> Judge Latimer concurred in a separate opinion, but

<sup>88</sup> Id.

<sup>891</sup> U.S.C.M.A. at 78-79, 1 C.M.R. at 79.

<sup>901</sup> U.S.C.M.A. 402, 3 C.M.R. 136 (1952).

<sup>911</sup> U.S.C.M.A. at 408, 3 C.M.R. at 142.

he did not mention the constitutional issue.

Since Judge Latimer wrote the opinion of the court in Clay, and the Chief Judge wrote the opinion in Welch, and Judge Brosman concurred in both major opinions in each case without separate opinion, it seems fair to say that, prior to Burns v. Wilson, the Court of Military Appeals, like Admiral Ruddock in the Deain case quoted in the introduction to this paper, thought that military personnel had no constitutional rights other than those which Congress had seen fit to duplicate in specific grants in the Uniform Code of Military Justice.

In the first case after <u>Burns v. Wilson</u>, however, a change occurred—but only in Chief Judge Quinn's opinion.

That first case was <u>United States v. Sutton</u>.

The issue in the case was whether Sutton had been denied the right to confront the witnesses against him, since a deposition taken on written interrogatories only was admitted into evidence against him at his court—martial. Judge Latimer ruled that there was nothing wrong with this procedure, since Article 49 of the Uniform Code specifically authorized the procedure in any non-capital case, which <u>Sutton</u> was. He reasserted the rule in <u>Clay</u> that military due process equalled only those rights and privileges granted by Congress, and since Article 49 specifically authorized the procedure in question, there was no violation

<sup>923</sup> U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

of military due process. Judge Brosman concurred, but on a historical approach that at the time the Constitution was adopted, the procedure in question was permitted in civilian courts; therefore, there was no violation. He was concerned that, in his view, the Court of Military Appeals did not have the power to rule any part of the Uniform Code unconstitutional, and therefore he deemed it his duty to attempt to reconcile Article 49 with the Constitution as much as possible—which, to him, could be accomplished by his historical approach.

Chief Judge Quinn dissented, saying

I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to all the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself [citing Burns v. Wilson]. 93

Similar decisions were rendered by the court, with each of the judges taking essentially the same position as in <u>Sutton</u> (although the facts in the other cases raised different constitutional issues) in <u>United States v. Williamson</u> and <u>United States v. Barnaby</u>. 95

The next case which the court considered was <u>United</u>

States v. <u>Voorhees</u>. 96 Although the merits of this case, which

<sup>933</sup> U.S.C.M.A. at 228, 11 C.M.R. at 228.

<sup>944</sup> U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

<sup>95&</sup>lt;sub>5</sub> U.S.C.M.A. 63, 17 C.M.R. 63 (1954).

<sup>964</sup> U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

for the first time raised a First Amendment issue in the Court of Military Appeals, will be discussed in detail later, suffice it to say at this point that Yoorhees showed an even deeper rift of opinion between the judges of the Court of Military Appeals on the issue of the applicability of the Bill of Rights to courts-martial. Lieutenant Colonel Voorhees had published a book which was critical of United States actions in the Korean War. Army regulations then (and now 97) required Voorhees to submit his manuscript to the Department of the Army for prior approval before publication. Upon that review, the military directed Voorhees either to change certain portions of his manuscript or not to publish. Voorhees published anyway and was prosecuted under Article 92 of the Uniform Code for violating the provisions of the then-applicable Army requlation. As a point of fact, the decision of the Court of Military Appeals rested on the sufficiency of the evidence and the nature of the military directives in the case, and not on any constitutional point. The court ended up by reversing the conviction and directing a rehearing, which never was held. 98 However, each of the judges in his separate opinion did discuss the constitutional issue.

<sup>97</sup>U.S. Dept. of the Army Reg. 360-5, 27 Sept. 1967, para. 9b. [Hereinafter, all such regulations will be cited as "AR" with the number and date following. United States Air Force regulations will be similarly cited as "AFR" with number and date.]

<sup>98</sup> New York Times, 4 Nov. 1954, p. 12, col. 4.

Chief Judge Quinn specifically addressed himself to the constitutional point of whether an Army regulation which required, in effect, prior permission to publish and authorized censorship could constitutionally form the basis of a criminal prosecution for failure to comply therewith. For reasons to be discussed in detail later, Chief Judge Quinn found that this abridgement of a member of the Armed Forces' constitutional rights to be justified, even assuming the First Amendment to be applicable; therefore, he found no constitutional right did exist; it was just in this case that the serviceman's rights evolved into something different from what might accrue under similar circumstances in civilian life.

Judge Latimer, both concurring with the Chief Judge and dissenting, concurred on the legal problems concerning the regulation, the evidence, etc., and therefore agreed to direct a rehearing on those grounds. He did dissent, however, over the constitutional approach taken by the Chief Judge, saying

I believe it unwise to apply civilian concepts of freedom of speech and press to the military service unless they are compassed within limits so narrow they become almost unrecognizable. Undoubtedly, we should not deny to servicemen any right that can be given reasonably. 99

Judge Brosman dissented, because he would clearly have applied the full protections of the First Amendment to the case;

<sup>994</sup> U.S.C.M.A. at 531, 16 C.M.R. at 105.

therefore, he would hold that the military requirement for prior approval and the military authority to censor unconstitutional. He said,

[I]t is undesirable that a military person, by virtue of his status as such, may become subject to the imposition of special limitations on the freedom with which he may express his personal views. . . [E]ven as to service personnel, I deem applicable to a partial—even to a substantial—extent the doctrine of the Supreme Court that the rights deriving from the First Amendment to the Constitution are to be jealously safeguarded by the judiciary . . . 100

The next case to come before the Court of Military Appeals involving a constitutional issue was <u>United States v.</u>

<u>Deain</u>, 101 which has been briefly mentioned previously. To restate the facts in that case, a Navy admiral had been challenged as a jury member sitting on the court-martial which tried Deain, because the admiral had said that persons in the military service did not have constitutional rights, except as duplicated by Congress; and that concerning the presumption of innocence, even though duplicated by Congress, the admiral said that he believed that anyone appearing before a Navy general court-martial was "probably" guilty of "something." Because of this last statement, the Court of Military Appeals unanimously reversed the conviction. However, on the constitutional issue, they again split.

<sup>1004</sup> U.S.C.M.A. at 545, 16 C.M.R. at 119.

<sup>101&</sup>lt;sub>5</sub> U.S.C.M.A. 44, 17 C.M.R. 44 (1954).

Chief Judge Quinn paraphrased the admiral's statement that members of the Armed Forces have no constitutional rights other than those which might be duplicated by specific grants from Congress, and then said "As to [this statement,] we disagree with Admiral Ruddock." As the basis for his grand "we" (there are three separate opinions in Deain itself), the Chief Judge cited <u>Voorhees</u>, which itself had the dubious honor of consisting of three separate opinions on the constitutional point:

This was just too much for Judge Brosman. While concurring in the result in <u>Deain</u>, he had the following to say on the constitutional issue:

I prefer to disassociate myself from the use made in the principal opinion of the Voorhees case, cited therein. There is a good deal to be said on the question of whether military personnel possess "any constitutional rights other than those which may have been duplicated by specific grants from Congress"—but I see no point in saying it here. Nor do I believe that this Court met the matter squarely in Voorhees. 103

Judge Latimer concurred in the result, but he did not meet the constitutional issue at all.

It should be noted that the <u>Sutton</u> case was decided in 1953, just following the <u>Burns v. Wilson</u> decision, and that <u>Williamson</u>, <u>Barnaby</u>, <u>Voorhees</u>, and <u>Deain</u> were all decided during the next year, 1954. From these cases, it seems fair to

<sup>1025</sup> U.S.C.M.A. at 50, 17 C.M.R. at 50.

<sup>1035</sup> U.S.C.M.A. at 56, 17 C.M.R. at 56.

say that Chief Judge Quinn would clearly apply the Bill of Rights, to the extent not excluded directly or by necessary implication from the Constitution itself. It also seems clear that Judge Latimer would not apply the Bill of Rights at all, at least as to the procedures of courts-martial. As to the First Amendment, it appears that Judge Latimer would not take so harsh a view; but even so, he thought it "unwise" to apply civilian constitutional standards to constitutional issues arising within the military context. Finally, it appears that Judge Brosman would go along with the views of Judge Latimer on procedural aspects, but that he would apply fully those constitutional safeguards which did not deal with the conduct of trials. This appears to be the only way to reconcile his opinions in all the other cases with his opinion in <u>Voorhees</u>, and with his dissent in <u>Deain</u>. Unfortunately, no further opinions from Judge Brosman are available, since his untimely death removed him from the court shortly after these decisions, and he was replaced by Judge Ferguson.

Oddly enough, another four years was to pass before the Court of Military Appeals decided another case involving a constitutional issue. That case was <u>United States v. Wysong</u>. 104

The propriety of Wysong's family's conduct on a military installation was the subject of a military investigation. Wysong had been ordered not to talk to anyone about the investigation.

<sup>1049</sup> U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

He did and was tried for disobeying the order. The Court of Military Appeals reversed the conviction, holding the order unconstitutionally overbroad. Judge Ferguson, writing for a unanimous court, said "Unquestionably, the order severely restricted the accused's freedom of speech." 105

In 1960 the court, in <u>United States v. Jacoby</u>, <sup>106</sup> reconsidered its <u>Sutton</u> decision concerning whether written interrogatory depositions violated the Sixth Amendment right of confrontation. Judge Ferguson sided with the Chief Judge in the opinion that it did. Judge Ferguson, in writing the opinion of the court, really said no more than Chief Judge Quinn had said in his dissent in <u>Sutton</u>:

[I]t is apparent that the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.107

In making this pronouncement, Judge Ferguson cited <u>Burns v.</u>

<u>Wilson</u> and a 1944 decision of the Third Circuit Court of Appeals, <u>United States ex rel. Innes v. Hiatt.</u>

As might be expected, Judge Latimer dissented, citing his opinion in <u>Sutton</u>. This was Judge Latimer's final constitutional case with the Court of Military Appeals, as his term

<sup>1059</sup> U.S.C.M.A. at 250, 26 C.M.R. at 30.

<sup>106&</sup>lt;sub>11</sub> U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

<sup>107&</sup>lt;sub>11</sub> U.S.C.M.A. at 430-431, 29 C.M.R. at 247.

<sup>108141</sup> F.2d 644 (3d Cir. 1944). See infra, p. 73.

expired and he was not reappointed. He was replaced by Judge Kilday.

in the Court of Military Appeals after Judge Kilday's appointment was the 1963 case of <u>United States v. Culp.</u> The issue in that case was whether the then-current procedure for trial by special courts-martial was constitutional, as nonlawyers were authorized to act as defense counsel, if the prosecutor was also a nonlawyer. Again there were three separate opinions by the judges, each differing over their ultimate resolution of the actual issue in the case. However, they were

<sup>109&</sup>lt;sub>14</sub> U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

<sup>110</sup> Judge Kilday wrote the principal opinion in Culp. He took a historical approach and determined that the Sixth Amendment's requirement for counsel in 1791 did not mean a lawyer. Thus he felt that the military procedure complied with the amendment, historically. Chief Judge Quinn concurred that the use of military nonlawyers was constitutional, thus joining with Judge Kilday to uphold the conviction (which was otherwise lawful). For a number of complex reasons involving the "training" which military nonlawyers received, Chief Judge Quinn thought that the Sixth Amendment's requirement of counsel was factually met under the circumstances. Judge Ferguson concurred in the result on the facts of the case; however, he in effect dissented on the constitutional point (although he did not so term his views). He stated he believed counsel to be a meaningless concept unless the counsel were a trained lawyer, and he called military nonlawyer counsel a military "anachronism."

It should be noted that the <u>Culp</u> decision is now moot because the 1968 amendments to the Uniform Code of Military Justice require that every accused tried by special court-martial "shall be afforded the opportunity to be represented by [legal-ly-qualified] counsel [furnished by the Government] . . . unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies." Art. 27(c)(1).

unanimous in their view that the Sixth Amendment applied to special courts-martial and would be dispositive of the issue.

Judge Kilday wrote:

I agree, thoroughly and completely, with the view that members of the military are not shorn of their constitutional rights while they remain in the military service. . . This court has, in many cases, recognized this protection of military men by the Bill of Rights.

Although Judge Kilday did not cite the "many cases" where the Court of Military Appeals had held that the Bill of Rights applied to servicemen, naturally he got agreement from both Chief Judge Quinn and Judge Ferguson that the Bill of Rights does apply.

Judge Quinn again repeated his views in full:

It has long been my position that service personnel "are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself."112

Judge Ferguson said, "I am satisfied that the Sixth Amendment, insofar as it pertains to the right of counsel, applies to trials by courts-martial." 113

The next major case to come before the court was <u>United</u>

<u>States v. Tempia</u>, 114 where the issue was whether the court

<sup>111&</sup>lt;sub>14</sub> U.S.C.M.A. at 206, 33 C.M.R. at 418.

<sup>112&</sup>lt;sub>14</sub> U.S.C.M.A. at 216-217, 33 C.M.R. at 428.

<sup>11314</sup> U.S.C.M.A. at 219, 33 C.M.R. at 431.

<sup>114&</sup>lt;sub>16</sub> U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

would apply the requirements of the Supreme Court decision in Miranda v. Arizona<sup>115</sup> to courts-martial. As might be expected, the judges essentially repeated themselves, as quoted above. However, in addition, the principal opinion, written by Judge Ferguson, added a new gloss to the Court of Military Appeals' views on Burns v. Wilson and the relationship of the Court of Military Appeals to the Supreme Court. Judge Ferguson wrote:

That military law exists and has developed separately from other Federal law does not mean that persons subject thereto are denied their constitutional rights. To the contrary, the very issue before the Supreme Court in Burns v. Wilson, supra, was whether such a denial had occurred. The Chief Justice, in an opinion in which three other justices concurred (two dissenting justices would have gone further and ordered additional examination of the facts below), pointed out: "The federal civil courts have jurisdiction over such applications." He then went on to state the duty of this Court and that of every other judicial body inferior to it:

"The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."

Mr. Justice Frankfurter, while opting for reargument of the case, nevertheless had no doubt that the military is "not freed from the requirements of due process of the Fifth Amendment." Burns v. Wilson, supra, at page 149.

The impact of Burns v. Wilson, supra, then, is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials. The issue on which the Court divided was not the applicability of constitutional rights but the scope of collateral re-

<sup>115384</sup> U.S. 436 (1966).

view by the Federal courts--"the manner in which the Court should proceed to exercise its power." Burns v. Wilson, supra, at page 139.116

After quoting those portions of <u>United States v. Jacoby</u> and <u>United States v. Culp</u>, already quoted, concerning the issue of the applicability of constitutional safeguards, Judge Ferguson continued:

Thus, it will be seen that both the Supreme Court and this Court itself are satisfied as to the applicability of constitutional safeguards to military trials, except insofar as they are made inapplicable either expressly or by necessary implication . . .

The point need not, however, be belabored. Sufficient has been said to establish our firm and unshakable conviction that Tempia, as any other member of the armed services so situated, was entitled to the protection of the Bill of Rights, insofar as we are herein concerned with it. We pass, therefore, to the Government's contention that Miranda, supra, involves a decision in the area of the Supreme Court's supervisory authority rather than constitutional principles . . .

At the outset, we must note that the Government's contention misapprehends the extent of the Supreme Court's supervisory authority over the administration of criminal justice. It goes no further than the bounds of the Federal judicial system . . . .

A cursory scrutiny of the opinion in <u>Miranda</u> makes crystal clear that the formulae there laid down by the Court are constitutional in nature . . . [A]11 [of the formulae are] indicative of the fact, hardly to be gainsaid, that the Court was laying down constitutional rules for criminal interrogation which are part and parcel of the Fifth Amendment.

ment's ingenious argument that <u>Miranda</u>, supra, does not deal with constitutional principles and, hence, may be rejected by this Court, in light of the safeguards with which a military accused has heretofore been protected. As the Chief Judge has noted, the

<sup>116&</sup>lt;sub>16</sub> U.S.C.M.A. at 633-634, 37 C.M.R. at 253-254.

To the foregoing, Judge Kilday added

Surprisingly enough, Chief Judge Quinn dissented in Tempia, but only because he thought that military legal practice, as it had developed from the mandates of Article 31, Uniform Code of Military Justice, as interpreted by the Court of Military Appeals, fully satisfied all constitutional requirements in the criminal interrogation area, and because he thought that the Supreme Court's reliance on military practice as an example to show that its Miranda rules would be practically workable in the civilian sphere indicated that the military practice already complied with the Miranda rules. Chief Judge Quinn did not, of course, change his view concerning the applicability of the Bill of Rights to servicemen, as previously stated by him in the cases quoted above.

Due to the death of Judge Kilday, his chair was filled by Judge Darden. He participated in three cases involving the constitutional issue of the freedom of speech. In each of these 1970 cases, Chief Judge Quinn wrote the opinion of the court,

<sup>11716</sup> U.S.C.M.A. at 634-635, 37 C.M.R. at 254-255.

<sup>118&</sup>lt;sub>16</sub> U.S.C.M.A. at 643, 37 C.M.R. at 263.

and Judge Darden concurred in each without comment. The cases were quite similar, so quotation from only two of them will suffice to indicate the constitutional determinations with which Judge Darden concurred.

In <u>United States v. Daniels</u>, 119 Chief Judge Quinn wrote:

The right to believe in a particular faith or philosophy and the right to express one's opinions or to complain about real or imaginary wrongs are legitimate activities in the military community as much as they are in the civilian community. 120

In <u>United States v. Gray</u>, 121 he wrote:

Servicemen, like civilians, are entitled to the constitutional right of free speech. The right of free speech, however, is not absolute in either the civilian or military community. The point of curtailment of the right is not, and perhaps in most instances cannot be, delineated in template form. Some restrictions exist of necessity in the armed forces which have no counterpart in the civilian community. 122

Judge Darden's concurrence with these pronouncements clearly indicates that he will continue the tradition established in the Court of Military Appeals that the Bill of Rights, except where it is either expressly or by necessary implication inapplicable, will be applied to servicemen. This is particu-

<sup>119&</sup>lt;sub>19</sub> U.S.C.M.A. 529, 42 C.M.R. 131 (1970).

<sup>120&</sup>lt;sub>19</sub> U.S.C.M.A. at 532, 42 C.M.R. at 134.

<sup>121&</sup>lt;sub>20</sub> U.S.C.M.A. 63, 42 C.M.R. 255 (1970).

<sup>12220</sup> U.S.C.M.A. at 66, 42 C.M.R. at 258.

larly critical, since with several changes in the composition of the Court of Military Appeals at the end of 1971, Judge Darden was reappointed the Chief Judge of the court. Former Chief Judge Quinn is still a member of the court, but no longer the Chief Judge. Judge Ferguson retired and was replaced by Judge Duncan. Thus while it is too soon to predict the trend of the Court of Military Appeals with its new judge, Judge Duncan, it is safe to assume that Chief Judge Darden and Judge Quinn will at least constitute a majority to continue the court's tradition that the Bill of Rights applies to servicemen.

If it is not clear from the foregoing, perhaps a word is in order concerning where and how the decision is made relative to what portions of the Bill of Rights will be considered <u>inapplicable</u> to servicemen, either because they are expressly stated in the Bill of Rights itself (such as the Fifth Amendment's exclusion of the military from the grand jury procedure requirements), or (more importantly) those which are excluded by "necessary implication." The prime source of such determinations is clearly the Supreme Court and, to a lesser extent, the other civilian Federal courts. This is clearly stated in the Court of Military Appeals' decision in <u>United States v. Tempia.</u> 123 The second source is, obviously, the Court of Military Appeals itself. As the high-

<sup>12316</sup> U.S.C.M.A. 625, 635; 37 C.M.R. 249, 255 (1967).

est court in the military judicial system, its rulings are binding on the lower military courts, and it alone exercises an authoritative interpretative function within the military system. Thus the decisions as to the specific applicability of the Bill of Rights to servicemen will not be an Executive, administrative decision, or even a "military" decision; it will be a judicial decision.

## 2. The Lower Federal Courts

After the decision in Johnson v. Zerbst in 1938, that a failure to follow constitutional requirements imposed on State court processes through the Fourteenth Amendment would deprive those courts of jurisdiction and therefore warrant issuance of a writ of habeas corpus by the Federal courts, it is not surprising that, notwithstanding the general approach of the Supreme Court in military habeas corpus cases before Burns v. Wilson, some of the lower Federal courts "rebelled" and applied more liberal standards to military habeas corpus cases before them.

<sup>12416</sup> U.S.C.M.A. at 640, 643; 37 C.M.R. at 260, 263.

Because of the small size of the military establishment prior to World War II, when Johnson v. Zerbst was decided, there were few military cases reaching the Federal courts until World War II got under way. The first case where the court applied a more liberal standard was Schita v. King 125 in 1943. In that case, the accused had been tried by a general court-martial during World War I for murder. The Eighth Circuit found that the proceedings at the court-martial were so meaningless that they reversed the decision of the district court, which had followed the traditional line. A new hearing was directed to determine whether a fair trial had been conducted. The authority cited for this action was Johnson v. Zerbst.

United States ex rel. Innes v. Hiatt 126 in 1944. Although the court found no error, it did look to whether the accused had been given due process at his court-martial. The District Court for the Middle District of Pennsylvania in 1946 in Hicks v. Hiatt 127 similarly reviewed the due process aspects of the court-martial in question, citing United States ex rel. Innes v. Hiatt as its authority. A similar action, citing the same

<sup>125133</sup> F.2d 283 (8th Cir. 1943).

<sup>126141</sup> F.2d 644 (3d Cir. 1944).

<sup>12764</sup> F. Supp. 238 (M.D. Pa. 1946).

case, was taken by the District Court for the District of Kansas in 1948 in Beets v. Hunter. 128

v. Hunter, which appeared to represent a liberalizing trend in the Supreme Court's view of the proper scope of inquiry on military habeas corpus cases, the Fifth Circuit's 1949 decision in Hiatt v. Brown 129 found that Brown did not have a "fair trial," all things considered; and that that lack of fairness amounted to a denial of due process, which warranted issuance of the writ. As has been noted earlier, 130 when appealed to the Supreme Court, this case was reversed. 131

Two other lower Federal court cases in the times before Burns v. Wilson are borderline as to whether they are really liberal decisions or simply traditional decisions decked out in liberal language. The first of these cases is Anthony v. Hunter. Although the court cited Johnson v. Zerbst as the basis for its decision, perhaps it could just as well have cited Dynes v. Hoover:

[T]he defects pointed out above are, in the studied judgment of this court, too serious to be

<sup>12875</sup> F. Supp. 825 (D. Kan. 1948).

<sup>129&</sup>lt;sub>175</sub> F.2d 273 (5th Cir. 1949).

<sup>130</sup> See supra, p. 33.

<sup>131&</sup>lt;sub>339</sub> U.S. 103 (1950).

<sup>13271</sup> F. Supp. 823 (D. Kan. 1947).

Although the court "talked" due process, it really decided that the court-martial simply did not follow the statutory requirements imposed by Congress and, therefore, that the court-martial's decision was void. This was not a new rule. However, it must be said that the court was at least willing to ask the question whether the court-martial had complied with the statutory requirements concerned; when Anthony's co-accused, who was tried in a common trial with him, challenged his conviction in another district court, the judge simply took the traditional line, found jurisdiction over both the person and the offense, and denied the writ. 134

In the second case, <u>Kuykendall v. Hunter</u>, <sup>135</sup> the Tenth Circuit decided the issue whether the long-standing military rule of joining all known offenses at one trial proceeding (currently still required by paragraph 30g, Manual for Courts-Martial, United States, 1969<sup>136</sup>) violated due process. Again,

<sup>133</sup> Id. at 831.

<sup>134</sup> Arnold v. Cozart, 75 F. Supp. 47 (N.D. Tex. 1948).

<sup>135&</sup>lt;sub>187</sub> F.2d 545 (10th Cir. 1951).

<sup>136&</sup>lt;sub>Manual</sub> for Courts-Martial, United States, 1969 (Rev. ed.), promulgated by Exec. Order No. 11,476, 34 Fed. Reg.

although the court "talked" due process and found that the procedures in question did not violate it, the decision was really no different from the decision of the Supreme Court in the first of Captain Oberlin M. Carter's cases, Carter v. Roberts, 137 decided in 1900. Carter there alleged that an aggregate sentence composed of more than one element of punishment (that is, fine, dismissal, etc.), was double punishment and therefore unconstitutional. The Supreme Court held that this form of punishment was authorized by Congress in the Articles of War and was therefore permissible. All that Kuykendall held was that the joining of all known offenses at one court-martial proceeding was authorized by Congress and therefore was not illegal.

of course it goes without saying that due to the traditional rule in military habeas corpus cases, there were also other lower Federal courts which, as in the case of Anthony's co-accused, 138 simply followed the traditional approach and almost invariably gave no relief, since they usually found that the court-martial had jurisdiction and had acted within the scope of its statutory powers. 139

<sup>10502-11075 (1969). [</sup>Not published in C.F.R. Hereinafter, the Manual will be cited as "M.C.M."]

<sup>137&</sup>lt;sub>177</sub> U.S. 496 (1900).

<sup>138</sup> See supra, n. 134.

<sup>139</sup>Anderson v. Hunter, 177 F.2d 770 (10th Cir. 1949); Hudspeth, 123 F.2d 40 (10th Cir. 1941); In re Wrublew-Supp. 143 (S.D. Cal. 1947).

During this same period, however, the United States Court of Claims decided Shapiro v. United States 140 in a liberal fashion. In that case, Shapiro contended that he had been given insufficient time to prepare his defense before the court-martial which tried and dismissed him from the service. When he brought a suit for back pay, the Court of Claims held that the procedures at Shapiro's court-martial violated due process, and that his Sixth Amendment right to effective counsel was also violated; and, citing Johnson v. Zerbst, the court granted relief.

Before discussing what transpired in the lower Federal courts subsequent to the Supreme Court's decision in <u>Burns v.</u>

<u>Wilson</u>, it might be helpful to review briefly what the state of the law was as a result of the <u>Burns</u> decision, in order to formulate a basis of analysis for what has happened since <u>Burns</u>.

First, it must be stressed that <u>Burns</u> did not overrule all of the "old" standards whereby the Federal courts would test military habeas corpus cases. Instead, if anything, <u>Burns</u> broadened the scope of that inquiry. Therefore, the old test of classic jurisdiction over the person and the subject matter remained valid. Further, <u>Burns</u> specifically reaffirmed the <u>Gusik v. Schilder</u> rule that the military accused must first exhaust completely his military remedies before the Federal courts could act in habeas corpus. Also, there was nothing

<sup>140&</sup>lt;sub>69</sub> F. Supp. 205 (Ct. Cl. 1947).

in <u>Burns</u> to overrule the old concept that the courts could.

look to the statutory power of the military tribunal, but

that they could not review "mere error" not amounting to an

issue which reached a "constitutional level." <u>Burns</u> did hold

that an issue reaching a "constitutional level" to which the

military tribunals did not give "full and fair consideration"

would authorize the Federal courts to grant habeas corpus;

and regardless of the complete clarity of the <u>Augenblick and</u>

<u>Juhl</u> decision, at least it affirmed that proposition. Finally,

<u>Burns</u> did not change in any way the old "hands off" rule con
cerning executive and purely military decisions, as repre
sented most recently (at that time) by <u>Orloff v. Willoughby</u>.

Second, it is interesting to note that these rules apply to any attack on the military in the civilian courts. As has been noted above, the original source of these rules was a line of cases arising mostly out of courts-martial which had resulted in imprisonment, thus putting the petitioner in the legal position to sue for a writ of habeas corpus. However, what if—like Augenblick—the petitioner had simply been dismissed, without going to prison? The early development to solve these kinds of problem was a suit for back pay in the United States Court of Claims. The Supreme Court has accepted a number of military cases arising in the Court of Claims; but when it did so, it generally applied the same rules that it did in habeas corpus cases; indeed, the "rule" outlined above that the Federal courts had no power to correct

and review "mere error" in military cases was decided in a case originating in the Court of Claims. 141 More recently, under current Federal statutes, 142 suits for either mandamus to compel the military to act 143 or for an injunction to prevent military action 144 have been brought.

It should be noted that there is a possibility that future suits in the Court of Claims for back pay, or for mandamus or injunctions, in military cases, may be barred by the decision of the Supreme Court in <u>United States v. Augenblick</u> and <u>Juhl</u>; however, as was discussed earlier, it is (hopefully) doubtful that the Supreme Court would cut off access to the Federal civilian courts by those servicemen whose factual situations (like both Augenblick's and Juhl's) simply did not give them the legal right to sue in habeas corpus. 145

The point to be made here, however, is that the courts have uniformly applied the rules outlined above to <u>all</u> the types of cases mentioned, whether it be strictly a habeas corpus

<sup>141</sup> Keyes v. United States, 109 U.S. 336 (1883).

<sup>142</sup> For a complete discussion of these statutes, see Cortright v. Resor, 325 F. Supp. 797, 808-820; reversed, 447 F.2d 245 (2d Cir. 1971).

<sup>143&</sup>lt;u>see</u> Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.), <u>affirmed</u>, 378 F.2d 538 (10th Cir.) (per curiam); <u>cert.denied</u>, 389 U.S. 1022 (1967).

<sup>144</sup> See Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969).

<sup>145</sup> See supra, p. 46 ff.

case, or a back pay suit, or a request for mandamus or injunction. Therefore, the list of "rules" outlined above may be used as a convenient sequential order of discussion, regardless of the exact nature of the lawsuit. However, it will become readily apparent that, since <u>Burns</u> and even with its more liberal rules, servicemen have not necessarily been any more successful in challenging collaterally military actions in the lower Federal civilian courts than they were before <u>Burns</u>.

v. Parker and their progeny, 146 virtually no cases have dealt with the issue of the jurisdiction of courts-martial, in the technical sense of jurisdiction over the person.

Burns' reaffirmance of the exhaustion of military remedies rule has been the downfall of many a case in the lower courts. Primarily this is because not only do the courts require the serviceman actually to go through the entire appellate process, which is what would normally be called the "exhaustion" of remedies; 147 in addition, the civilian courts have held that if the serviceman did not raise the issue in question at the military tribunal or administrative board below, he failed to "exhaust" his military remedies by depriving the military authorities of a chance to "pass" on that

<sup>146</sup> see supra, n. 76.

<sup>147</sup>Beard v. Stahr, 370 U.S. 41 (1962) (per curiam); Noyd v. McNamara, <u>supra</u> n. 143; Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Rank v. Gleszer, 288 F. Supp. 174 (D. Colo. 1968).

claim, therefore, the civilian courts refuse to allow the issue to be raised for the first time before them. 148

Perhaps the most unpalatable decision in this context is that of Noyd v. McNamara. 149 Captain Noyd claimed to be a conscientious objector. He applied for an administrative discharge from the Air Force on that ground and was refused. He sued for "declaratory relief, an injunction, and writs of habeas corpus and mandamus, "150 alleging the incorrectness of the administrative refusal to discharge him. The court ruled that Captain Noyd had not exhausted his military "remedies" until he had been tried by a court-martial for wrongfully refusing to obey military orders, and until that courtmartial ruled on the validity of his defense that he could lawfully refuse to obey the orders because he conscientiously objected to them. Captain Noyd was therefore forced to do just that, the military courts rejected his defense, and he ended up in prison. 151 Luckily, other courts have not been

<sup>148</sup> McKinney v. Warden, 273 F.2d 643 (10th Cir. 1959); Suttles v. Davis, 215 F.2d 760 (10th Cir.), cert.denied, 348 U.S. 903 (1954), rehearing denied, 348 U.S. 932 (1955); Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953); Narum v. United States, 287 F.2d 897 (Ct. Cl. 1960).

<sup>149</sup> See supra, n. 143.

<sup>150</sup> Id. at 702.

legal in this context, where they are given subsequent to an improper denial of a request for discharge as a conscientious objector, see United States v. Steward, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971), and United States v. Larson, 20 U.S.C.M.A. 565, 43 C.M.R. 405 (1971); but cf. Parisi v. Davidson, 405 U.S. 34 (1972), reversing 435 F.2d 299 (9th Cir. 1970).

so harsh in dealing with cases involving similar circumstances; 152 and, indeed, it appears that on the basis of a current Supreme Court opinion, if the Novd case itself were to be decided by a civilian Federal court at the present, it might go the other way. 153

Only a few cases have turned on the issue of the statutory powers of the court-martial, and its corollary, the "mere error" rule. However, most of those cases in this area have simply followed the traditional rule and have denied relief, even if actual error (not of a "constitutional level") was found. 154

As to the new rule in <u>Burns</u> and affirmed in <u>Augenblick</u> and <u>Juhl</u>, that the lower Federal courts may consider claims that the military has not given full and fair consideration to issues of a "constitutional level," again the serviceman has not fared well. Some courts have simply ruled that the point questioned did not have constitutional import. <sup>155</sup> This has been particularly true in the Court of Claims since it was re-

<sup>152</sup> See Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); accord, Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968), and Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968).

<sup>153</sup> parisi v. Davidson, supra, n. 151.

<sup>154</sup>smith v. Resor, 406 F.2d 141 (2d Cir. 1969); White v. Humphrey, 212 F.2d 503 (3d Cir. 1954); Narum v. United States, 287 F.2d 897 (Ct. Cl. 1960); Krivoski v. United States, 145 F. Supp. 239 (Ct. Cl.), cert.denied, 352 U.S. 954 (1956).

<sup>155</sup> Owings v. Secretary, United States Air Force, 447 F.2d 1245 (D.C. Cir. 1971), reversing 298 F. Supp. 849 (D.D.C. 1969); Allen v. VanCantfort, 436 F.2d 625 (1st Cir. 1971); Smith & Argyle v. McNamara, 395 F.2d 896 (10th Cir. 1968).

versed in Augenblick and Juhl on that very basis. 156 Other courts have ruled that, because the military courts have fully considered the constitutional issue, they must deny the serviceman relief--regardless of the nature of the consideration given. 157 One court ruled that the holding in Burns meant that the civilian courts could consider only those constitutional claims which the accused below had raised, but which the military tribunals had refused to consider. 158 In light of the current position of the Court of Military Appeals that it has a duty to determine constitutional claims, using the guidelines established by the Supreme Court, to the extent that they are applicable to the military situation, it hardly seems possible that any constitutional claim actually considered by the Court of Military Appeals could reach the civilian courts in a posture where they would consider the claim. On the other hand, it is possible that the civilian courts would disagree with the Court of Military Appeals' decision on the constitutional point and grant relief. That has

<sup>156</sup>Gallagher v. United States, 423 F.2d 1371 (Ct. Cl. 1970).

<sup>157</sup>United States ex rel. Thompson v. Parker, 399 F.2d
774 (3d Cir. 1968), cert.denied, 393 U.S. 1124 (1969); Palomera
v. Taylor, 344 F.2d 937 (3d Cir.), cert.denied, 382 U.S. 946
(1965); Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959); Thomas
v. Davis, 249 F.2d 232 (10th Cir. 1957); Dickenson v. Davis, 245
F.2d 317 (10th Cir. 1957); Dixon v. United States, 237 F.2d 509
(10th Cir. 1956); Mitchell v. Swope, 224 F.2d 365 (9th Cir.
1955); Bouchier v. VanMetre, 223 F.2d 646 (D.C. Cir. 1955);
Suttles v. Davis, 215 F.2d 760 (10th Cir.), cert.denied, 348
U.S. 903 (1954); Begalke v. United States, 286 F.2d 606 (Ct.
Cl.), cert.denied, 364 U.S. 865 (1960).

<sup>158</sup> suttles v. Davis, 215 F.2d 760 (10th Cir. 1954).

not yet occurred; but as future discussion will show, there is certainly one Court of Military Appeals decision on a constitutional issue with which reasonable men could heartily disagree. 159 Additionally, there is always the possibility that the Court of Military Appeals would refuse to hear a case involving an issue which was of a constitutional level; or—as in the case of <u>Juhl</u> which ultimately reached the Supreme Court via the Court of Claims—the case could be one where the serviceman was simply not entitled by the provisions of Article 67(b) of the Uniform Code of Military Justice to have his case heard by the Court of Military Appeals. In either of these situations, the constitutional issue could reach the civilian courts without ever being heard by the Court of Military Appeals.

Finally, it has been noted that <u>Burns</u> did not change the old "hands off" rule concerning nonintervention by the civilian courts in decisions made by the executive and the military. This rule has been the basis for the denial of more requests for remedial action in the Federal civilian courts than any other single rule listed above. 160

<sup>159</sup> United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967), discussed in detail <u>infra</u>, Part IV.

<sup>160</sup> Nixon v. Secretary of the Navy, 244 F.2d 934 (2d Cir. 1970); Byrne v. Resor, 412 F.2d 774 (3d Cir. 1969); Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969); United States ex rel. Schonbrunn v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), cert.denied, 394 U.S. 929 (1969); Fox

In my opinion, these results are not shocking, for two reasons. First, as noted earlier, if the case involves the action of a court-martial, and if the case is actually heard by the Court of Military Appeals, in most cases the Court of Military Appeals will decide the constitutional issue in a manner which is so patently correct that it will be dispositive of the issue. Second, whether the case was heard by the Court of Military Appeals or not, and particularly if the case relates to an administrative action by the military establishment, it is a simple but true fact that the civilian courts are extremely reluctant to intervene. In my opinion, this reluctance is proper. Its propriety turns on the concept of military discipline -- a concept which will be discussed in detail in the next section of this paper and which will be raised repeatedly thereafter. What military discipline is all about is the obedience to military orders and military law. It is most effective if that obedience is willing. If the civilian courts were to become a ready source wherein military administrative decisions, particularly, could be challenged, there would be a strong likelihood that the "willing" aspect of military discipline would seriously decline. In addition, there is no ques-

v. Brown, 402 F.2d 837 (2d Cir. 1968); Davies v. Clifford, 393 F.2d 497 (1st Cir. 1968); Noyd v. McNamara, 378 F.2d 538 (10th Cir.) (per curiam), cert.denied, 389 U.S. 1022 (1967); Brown v. McNamara, 287 F.2d 150 (3d Cir. 1967), cert.denied, 390 U.S. 1005 (1968); Feliciano v. Laird, 311 F. Supp. 791 (E.D. N.Y. 1970); Anderson v. Laird, 316 F. Supp. 1081 (D.D.C. 1970); Locks v. Laird, 300 F. Supp. 915 (N.D. Cal. 1969); Arnheiter v. Ignatius, 292 F. Supp. 174 (D. Colo. 1968).

tion that the military is autocratic and sometimes unpleasant; it was for demonstrating that aspect of military life that the quotation from Judge Moore was made at the beginning of this paper. If the courts actively granted military complaints, they would likely be flooded with them. They would ultimately end up virtually conducting the day-to-day operations of the military, and possibly end up making some of its policy decisions. This the courts have been properly reluctant to do. As the Supreme Court phrased it in Orloff v. Willoughby,

Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. 161

On the other hand, where clear injustices might result or have in fact resulted, but where the case does not fit exactly within the "rules" as outlined above, there ought to be some way by which those injustices could be corrected in the civilian courts. After all, one would think that the purpose of the courts is to see that justice is done for all; and the mere fact that the parties involved are the military and a particular serviceman should not be a sufficient reason to deny correcting a real injustice, should one exist. Particularly when the claim of injustice is bottomed on a constitutional principle, it seems that the courts should at least adjudicate the issue, consistent with the way in which they adjudicate

<sup>161345</sup> U.S. at 94.

such issues arising elsewhere in the land.

For example, the rule concerning the exhaustion of military remedies would be an appropriate rule in both the military and civilian contexts (certainly the military should be given a chance to correct its own errors, first, if there be errors). However, blind adherence to the rule should not happen, as in the Noyd case. Although it was clear that Captain Noyd's request for administrative discharge was properly denied, the court should have bottomed its decision on that fact -- the real issue in the case--and not on a basis that Captain Noyd had not "exhausted" his military remedies because he had not yet been court-martialled for refusing to comply with military orders inconsistent with his claimed conscientious objector status, and therefore had not yet raised his defenses (if any) in the military courts. Further, even at the time Novd was decided, it did not appear that a civilian in similar legal circumstances would be required to make his arguments as a defendant in a criminal prosecution, as a prerequisite to seeking relief in the Federal courts. 162 Fortunately, with the recent Supreme Court decision in Parisi v. Davidson, 163 it appears that the Novd decision would go the other way if brought before the

<sup>162</sup> see the discussion of Captain Noyd's argument that Dombrowski v. Phister, 380 U.S. 479 (1965) should apply to individuals in the military, Noyd v. McNamara, 378 F.2d 538, 540 (10th Cir. 1967). Cf. Parisi v. Davidson, supra n. 151.

<sup>163&</sup>lt;sub>See supra</sub>, n. 153.

courts now. Further, it is not surprising that, just as some lower Federal courts were more "liberal" in their application of the "rules" prior to <u>Burns v. Wilson</u>, so some courts have been similarly "liberal" in their dealing with military cases, even before <u>Parisi</u>. For example, <u>Hammond v. Lenfest 164</u> on virtually the same facts as <u>Noyd v. McNamara</u> specifically rejected <u>Noyd</u> and "did justice."

There are, fortunately, other examples of this attitude.

Initially after <u>Burns</u>, the Court of Claims was fairly liberal in its approach to military cases. However, after the Supreme Court reversed the Court of Claims in the <u>Augenblick and Juhl</u> decision, holding that the issues on which the Court of Claims had granted relief did not equal issues of constitutional import, the Court of Claims has rather backed off from its liberal approach. For example, in the 1970 decision in <u>Gallagher v. United States</u>, 166 Gallagher had requested back pay on the theory that his court-martial was invalid because of a conflict of interests on the part of his defense counsel. The Court of Claims denied relief, holding that the issue did not rise to a "con-

<sup>164398</sup> F.2d 705 (2d Cir. 1968).

<sup>165</sup> Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966), compare with Gearinger v. United States, 412 F.2d 862 (Ct. Cl. 1969); Hooper v. United States, 326 F.2d 982 (Ct. Cl.), cert. denied, 377 U.S. 977 (1964); Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967) and Juhl v. United States, 383 F.2d 1009 (Ct. Cl. 1967), both reversed sub nom. United States v. Augenblick and Juhl, 393 U.S. 348 (1969).

<sup>166423</sup> F.2d 1371 (ct. cl. 1970).

stitutional level," and had the following to say about its authority after the Supreme Court's reversal of its <u>Augenblick</u> decision:

We understand [Augenblick] to mean that constitutional issues triable by us do not necessarily arise when a military tribunal that fully acknowledges a constitutional right takes measures it deems in good faith sufficient to implement it, as to which the opinions of others may differ. Whatever else the Congress intended by the finality language [of Article 76, Uniform Code of Military Justice], its purpose to rely wholly on the experience of military tribunals to defend the serviceman's rights in such an instance was clear to the Supreme Court [in Augenblick].167

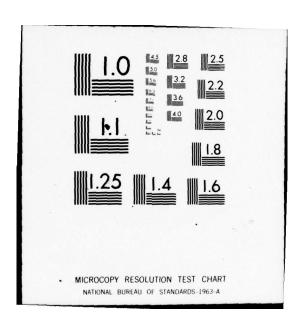
There have been examples of liberal decisions in many of the circuit courts of appeal. In Ashe v. McNamara, 168 the First Circuit considered a petition requesting mandamus to the Secretary of Defense to recharacterize a discharge issued under other than honorable conditions by a court-martial, where the accused was defended by counsel with a clear conflict of interests. The court-martial had been finally approved, and the accused had sought administrative recharacterization of the discharge, without success. The court directed recharacterization on the theory that the accused was deprived of his constitutional right to effective counsel. The Second Circuit in Wasson v. Towbridge 169 remanded an administrative

<sup>167</sup> Id. at 1378.

<sup>168355</sup> F.2d 277 (1st Cir. 1965).

<sup>169382</sup> F.2d 807 (2d Cir. 1967).

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discharge case to the district court for a full hearing on the issue of whether petitioner had been given constitutional due process in the administrative discharge proceedings against him. The district court had held that it had no authority to intervene in the case, when the Coast Guard Academy had followed its own regulations in the case; but the Second Circuit determined that when a constitutional claim was made, the Federal courts did have the authority and were therefore required to investigate the claim. In Dash v. Commanding General 170 and Yahr v. Resor, 171 both cases dealing with the First Amendment in relation to the distribution of literature on military installations by servicemen, the Fourth Circuit required full justification by the military of its reasons why, if any, distribution could not be allowed, with the assumption that distribution would be required should not the military be able to produce sufficient justification other-In Rushing v. Wilkinson, 172 the Fifth Circuit actually reviewed the merits and quality of a military court decision in the case before it, rather than simply holding that the civilian courts had not the lawful power to "review" military decisions. The Eighth Circuit in Swisher v. United

<sup>170&</sup>lt;sub>429</sub> F.2d 427 (4th Cir. 1970) (per curiam), <u>affirming</u> 307 F. Supp. 849 (D.S. Car. 1969).

<sup>171431</sup> F.2d 690 (4th Cir. 1970).

<sup>172272</sup> F.2d 653 (5th Cir. 1959), cert.denied, 364 U.S. 914 (1960).

States 173 granted a petitioner on habeas corpus the right to raise for the first time in the civilian courts the issue of his mental competency, rather than saying that his failure to do so below was a failure to "exhaust" his military remedies. In Schwartz v. Covington, 174 the Ninth Circuit granted an injunction against the Army on behalf of a serviceman who was being administratively separated at a point where he had over eighteen years' service. The serviceman claimed that he wanted to challenge the sufficiency of the discharge proceedings against him, and that he did not want to be discharged in fact until he had had the opportunity to appeal his discharge to the Board for Correction of Military Records and, if that failed, thereby perfect his right to contest the decision in the civilian courts -- all without being discharged first. The court's injunction thus required the military to retain the petitioner on active duty until he had in fact exhausted all his remedies against being involuntarily separated. In Kennedy v. Commandant, 175 the Tenth Circuit actually adjudicated a constitutional claim that nonlawyer counsel at a special court-martial violated the Sixth Amendment, when that procedure was specifically authorized in the Uniform Code of Military Justice, and

<sup>173354</sup> F.2d 472 (8th Cir. 1966).

<sup>174341</sup> F.2d 537 (9th cir. 1965).

<sup>175377</sup> F.2d 339 (10th cir. 1967).

despite a specific decision by the Court of Military Appeals in <u>United States v. Culp</u> --rendered some three years prior to the <u>Kennedy</u> case itself--that the provisions of the <u>Uniform Code</u> in this regard were constitutional.

Perhaps of all the cases the most liberal is the District of Columbia Circuit Court of Appeals decision in Kauffman y. Secretary of the Air Force. 177 Kauffman was an Air Force officer who was tried by court-martial for various technical specifications concerning his espionage-type conduct with East German agents, and for his failure to report these contacts to appropriate military authorities, as required by certain Air Force regulations. After a full review by the Court of Military Appeals, only one specification remained. Nonetheless, Kauffman spent two years in prison and was administratively discharged for his conduct (the punitive dismissal adjudged by the court-martial was cancelled and the administrative discharge substituted therefor). Kauffman alleged various constitutional defects in his court-martial proceedings, all of which had been fully considered and resolved against him by the Court of Military Appeals.

When the case reached the Circuit Court of Appeals for the District of Columbia, the court withheld its judgment for some time, awaiting the decision of the Supreme Court in

<sup>176</sup> see, supra, n. 109.

<sup>177415</sup> F.2d 991 (D.D. Cir. 1969).

Augenblick and Juhl. Whatever impact that decision had on the decision in <u>Kauffman</u>, there is no question that the court gave a liberal treatment to Kauffman's complaints. The court in fact reviewed all the issues raised by Kauffman, even though they had been adjudicated by the Court of Military Appeals, saying:

We think the scope of review of military judgments should be the same as that in habeas corpus review of state and federal convictions, and constitutional requirements should be qualified by the special conditions of the military only where these are shown to require a different rule. 178

While not all of the above "liberal" cases involved a constitutional issue, the majority of them did. And it must be stressed that merely because the Federal civilian court adjudicated the constitutional issue does not in any way mean that the court found the military decision in the case either legally or constitutionally incorrect. On the contrary, the Tenth Circuit case cited above resulted in a finding of no constitutional error, as did the ultimate decision in Kauffman v. Secretary of the Air Force. Thus it is not the actual end result of the decision that is critical; what is critical is that the civilian courts fully considered, and therefore vindicated, a serviceman's constitutional claims.

The quotation from the opinion of the court in the Kauffman case seems to articulate most clearly what all of

<sup>178</sup> Id. at 992.

the courts making "liberal" decisions have been tacitly doing; the Kauffman court was perhaps more bold than the others. Further, the harmony between the quotation above in the Kauffman case with Justice Frankfurter's comments in Burns v. Wilson is most striking. If Justice Frankfurter deplored the disparity that could result if State and Federal civilian decisions could be challenged collaterally, but court-martial decisions could not, 179 what course of action would be fair, other than to bring the two into line? And certainly since one set of established rules would have to give way, Justice Frankfurter apparently would have had the rules concerning military cases to be changed. Just as the Kauffman court said, Justice Frankfurter's views can only mean "We think the scope of review of military judgment should be the same as that in habeas corpus Justice Frankfurter did say that he did not "agree that the scope of inquiry is the same as that open to us on review on State convictions" when considering a military case, he continued immediately to say that "the content of due process in civil trials does not control what is due process in military trials." 181 But this is the same thing that the District of Columbia Circuit Court is saying in Kauffman, when it says

<sup>179346</sup> U.S. at 844.

<sup>180&</sup>lt;sub>415</sub> F.2d at 992.

<sup>181346</sup> U.S. at 149.

that "constitutional requirements should be qualified by the special conditions of the military only where these are shown to require a different rule." 182 Both Mr. Justice Frankfurter's comment and the Kauffman court comment merely recognize that the Constitution on occasions will apply differently to the military, because of the nature of the military environment and the demands of discipline. This is the same as saying that the provisions of the Constitution will apply to servicemen to the full extent "except insofar as they are made inapplicable either expressly or by necessary implication." 183 Additionally, this is the same formulation of the rights of servicemen under the Constitution which Justices Black and Douglas made in their dissent in Burns, and the quotation above is the formula repeated frequently by the Court of Military Appeals in its decisions. 184 Finally, it would appear that the District of Columbia Circuit Court on the issue of the burden of proof would place that burden on the Government, when a particular constitutional privilege was involved and the Government wanted to argue that a rule more restrictive of constitutional rights should be ap-

<sup>182415</sup> F.2d at 992.

<sup>183</sup> United States v. Tempia, 16 U.S.C.M.A. 629, 634; 37 C.M.R. 249, 254 (1967).

<sup>184&</sup>lt;u>See</u> 346 U.S. at 150-154; United States v. Tempia, 16 U.S.C.M.A. 629, 634, 37 C.M.R. 249, 254 (1967); United States v. Culp, 14 U.S.C.M.A. 199, 216-217, 33 C.M.R. 411, 428; United States v. Jacoby, 11 U.S.C.M.A. 428, 430-431, 29 C.M.R. 244, 247 (1960); United States v. Sutton, 3 U.S.C.M.A. 220, 228, 11 C.M.R. 220, 228 (1953).

plied to the military. Considering the high regard for constitutional rights, that certainly does not seem unreasonable.

## D. Summary

It seems clear beyond question that the original view of the drafters of the Bill of Rights was that those amendments to the Constitution were simply not intended to apply to servicemen. The views and decisions of the Supreme Court confirmed this view for almost a century and a half. Thus the impact of <u>Burns</u> v. Wilson's recognition that servicemen do have rights emanating from the Bill of Rights makes that decision indeed notable.

eventually determined that servicemen have all the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable from the wording of the amendments themselves. It further held that it was its duty, using the Supreme Court's decisions as guides, to determine which of those amendments applied and to what extent each applied. While this position markedly assures constitutional safeguards being applied at military courts-martial, it has also gone markedly beyond Burns, since the innovation created by Burns, if literally taken, only means that the Federal civilian courts may grant relief to servicemen whose constitutional claims have not been "fully and fairly considered" by the military. If the claim is before the Court of Military Appeals, "full and

fair consideration" is so usually accorded that the Federal civilian court has no authority to act—if the civilian court takes <u>Burns</u> literally. Accordingly, some lower Federal courts have taken a less restrictive view than a literal reading of <u>Burns</u> would require, and they have set out to vindicate constitutional claims of servicemen to the same extent that such a claim would be adjudicated if it arose from either a State or Federal court and not from a Federal court—martial. Further, the Supreme Court's decision in <u>Augenblick and Juhl</u> does not seem to be contrary to this position—at least insofar as habeas corpus suits are concerned.

of course no one can predict with accuracy and certainty what the Supreme Court would hold, if it were faced with a future, clear-cut case involving a constitutional right which under a technical application of the <u>Burns</u> ruling could not be considered, but which under any sense of justice, should be considered by the Federal judiciary. Considering what has happened since <u>Burns</u>, both in the Court of Military Appeals and in the lower Federal courts, and if faced squarely with the issue, it would seem to be the better decision for the Supreme Court to rule clearly (at last!) that the Bill of Rights, except where it is expressly or by necessary implication inapplicable, does apply to servicemen, and that the Federal courts can vindicate a serviceman's constitutional claims the same as they can those of any other citizen.

In any event, it appears clear that the "original under-

standing" of a serviceman's constitutional rights is clearly not the current understanding of those rights; and that, even though there is no direct ruling of the Supreme Court so stating, the Bill of Rights does now apply to servicemen, except where the courts determine that it is either expressly or by necessary implication inapplicable.

#### PART II

THE FIRST AMENDMENT: SOME BASIC CONSIDERATIONS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### -- The First Amendment

An initial reading of the First Amendment to the United States Constitution gives the impression that it speaks of many fragmented ideas—the establishment of religion, the free exercise of religion, free speech, and so on. However, for discussion purposes herein, the amendment will be divided into two broad categories: freedom of religion, and freedom of "expression."

The second of these categories requires some definition. Freedom of the press and the right to petition the Government for redress appear to be quite disparate. However, the use of the word "expression" to encompass all the concepts of the First Amendment—other than those dealing with religion—has come into being, 185 and appropriately so. If the press may print whatever it wills, that amounts to the right of the authors and the publishers to express themselves freely. Since assemblies of people are usually for the purpose of communi-

<sup>185</sup>T. Emerson, The System of Freedom of Expression 17-18 (1970). [Hereinafter cited as "Emerson."]

cating certain ideas between those present—and sometimes to others not present—assembly is also a form of expression.

The same is true of petitioning the Government.

Before turning first to a specific discussion of a serviceman's right to religious freedom, and then to his right to express himself freely, certain other matters should be considered. Not only should any necessary terms be defined, but other considerations common to an examination of both portions of the First Amendment are relevant. Among these are a discussion of the basic premise of the freedom of belief; a very general and brief discussion of the present confused state of the civilian law concerning the First Amendment's provisions relating to freedom of expression; a discussion of the interesting and complex question of whether the First Amendment, on its own terms applies to servicemen at all; and, finally, a brief discussion of the concept of military discipline, which, as the discussion proceeds, will be of obvious importance to understanding the nature of a serviceman's right to both freedom of religion and freedom of expression. These points will be discussed seriatim.

## A. The Basic Premise: Freedom of Belief

Freedom of (<u>silent</u>) belief or disbelief is obviously beyond the control of Government--short, perhaps, of "brain-washing" in the psychological sense. It therefore does not really need the First Amendment. <u>However</u>, freedom of (<u>silent</u>)

belief is obviously the base from which springs the outward (either action or non-silent) manifestations of both religion and expression.

The point is most clear relative to religion; indeed, a common synonym for the word "religion" is the word "faith," which is usually defined as a set of <u>beliefs</u> about God. Thus the right to believe whatever one wants about things religious is essential to any meaningful concept of freedom of religion.

And the same is true of freedom of expression. The only difference is that the subject of the belief does not necessarily concern spiritual matters; the belief can be about anything. But before people speak, publish, assemble for some purpose, or petition the Government for the redress of some grievance, they must first have ideas and thoughts-beliefs, if you will.

As Professor Thomas I. Emerson points out in the early pages of his book The System of Freedom of Expression,

Forming or holding a belief occurs prior to expression. But it is the first stage in the process of expression, and it tends to progress into expression. Hence safeguarding the right to form and hold beliefs is essential in maintaining a system of freedom of expression. Freedom of belief, therefore, must be held included within the protection of the First Amendment. This proposition has indeed been accepted consistently and without hesitation by all courts and commentators. 186

<sup>186</sup> Emerson at 21-22.

In the courts, the major comment concerning freedom of belief tends to revolve around religious belief; however, like Mr. Emerson's comment quoted above, all such comments are equally applicable both to religion and to expression. For example, while Mr. Emerson's topic of discussion was freedom of expression in the passage quoted, he continues immediately by himself quoting this passage from Mr. Justice Roberts' opinion in <u>Cantwell v. Connecticut</u>, <sup>187</sup> a case involving freedom of religion:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. 188

Great debate has centered about the words of the First Amendment's mandate that "Congress shall make no law . . . ."

Mr. Justice Black took an "absolutist" position that the phrase "no law" meant exactly that, in relation to any aspect of either freedom of religion or freedom of expression.

However,

<sup>187310</sup> U.S. 296 (1940).

<sup>188</sup> Id. at 303-304; quoted in Emerson at 24.

<sup>189</sup> See e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring); see also Meikeljohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245.

as the passage from <u>Cantwell v. Connecticut</u> quoted above clearly indicates, the majority of the Supreme Court has never held that the <u>entire</u> First Amendment is an absolute. Instead, they have held that only freedom of belief is an absolute, while the exercise of that belief—whether by religious activity or by mere expression—cannot be, in the nature of things, absolute.

As to members of the military, the same rule is true.

In 1970 the Court of Military Appeals considered a conviction

of an offense laid under the "crimes and offenses not capital"

portion of Article 134 of the Uniform Code of Military Justice.

The specification charged

that, with intent to interfere with the loyalty, morale, and discipline of named members of the Marine Corps, [the accused] urged and attempted to cause insubordination, disloyalty, and refusal of duty on the part of said members contrary to 18 U.S.C. § 2387.190

The opinion of the court began with the proposition that "The right to believe in a particular faith or philosophy . . . [is a] legitimate activit[y] in the military community as much as . . . in the civilian community." While the case clearly involved an issue centering on freedom of expression, it is interesting to note that the Court of Military Appeals spoke of the freedom to believe in a particular "religion or philosophy" (emphasis added), thus equating them insofar as the issue

<sup>190</sup> United States v. Daniels, 19 U.S.C.M.A. 529, 531, 42 C.M.R. 131, 133 (1970).

<sup>19119</sup> U.S.C.M.A. at 532, 42 C.M.R. at 134.

of freedom of belief is concerned.

One could contend that the foregoing is not required to be discussed or even mentioned in this paper; after all, as said earlier, it is virtually impossible for the Government to control thought. But expression of thoughts, or actions based on them, are entirely different matters. Thus what the courts have really done—and the point of this discussion—is only to recognize the fact that mankind's thoughts—his beliefs—are ultimately uncontrollable, short of "brainwashing."

Even so, the basic concept of freedom of belief is so important to any discussion of the First Amendment that it must be mentioned: While freedom of belief is, in the nature of things, factually uncontrollable and therefore is legally recognized as an "absolute," action and expression based on one's beliefs are factually controllable and they, therefore, will be "subject to regulation for the protection of society." Thus the real question is inevitable: When is the regulation in question constitutional? That will be the subject of the discussion which follows.

## B. The Law of the First Amendment: A Brief Overview

The essence of the legal issue involved in the First Amendment has just been stated: if freedom of belief is an absolute, but freedom of religion, action, and expression are not absolutes, what are the parameters? If these "freedoms" always "remain subject to regulation for the protection of

society," how does one balance the competing interests? These questions, so easily asked, are as extremely difficult to answer as any question in American law. The essential task is to limit the freedoms involved. But what are the rules (if any) which have evolved? When do they apply?

The keynote to the answer is supplied partly by the question: Balancing the competing interests is the essential issue. When the balance swings in favor of individual interests, the "freedom" involved is preserved. But when it swings in the interests of society, the individual "freedom" involved is limited. When each occurs is the controversial issue. At any time the issue is that of <a href="limiting">limiting</a> supposed freedoms—which easily become mentally transformed into supposed "rights"—the answers will almost always be difficult. To paraphrase Justice Holmes' famous statement in the <a href="Northern Securities Co.">Northern Securities Co.</a> case,

Great [issues] like hard cases make bad law. For great [issues] are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. 192

Nothing could be more truly said of the issues involved in the First Amendment.

As the ensuing discussion will amply demonstrate, the development of the law of the First Amendment relating to freedom of religion can be discussed in conjunction with that area

<sup>192&</sup>lt;sub>193</sub> U.S. 197, 400 (1904) (dissenting).

of the amendment as it applies to servicemen. However, the development of the law concerning freedom of expression—including freedom of speech, the press, assembly, and petition—is a much more difficult and complex area. For reasons which will become apparent shortly, it is more appropriate to discuss the development of the law concerning freedom of expression at this point.

For almost 130 years after the adoption of the Constitution and the Bill of Rights, no one thought that the free speech portions of the First Amendment meant anything more than that prior restraints on speech could not be imposed—that speech (and the press) could not be censored in advance. 193 However, in its 1919 decision in Schenck v. United States, 194 the Supreme Court finally began to indicate that the First Amendment meant much more than only a prohibition against prior restraints. 195 Justice Holmes, writing for the Court, rejected the notion that the First Amendment is an "absolute," and in so doing made his famous and oft-quoted (and oft-misquoted) statement that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 196 Justice Holmes then went on

<sup>193</sup> See Patterson v. Colorado, 205 U.S. 454, 462 (1907) (dicta), quoting earlier cases.

<sup>194&</sup>lt;sub>249</sub> U.S. 47 (1919).

<sup>195</sup> Id. at 51-52.

<sup>196</sup> Id. The errors most frequently made in quoting this passage are the omission of the word "falsely" and the insertion (before the word "theatre") of the word "crowded."

to formulate the "clear and present danger" test as a means to determine when the Government could lawfully prohibit speech in the face of the amendment's prohibitory language:

The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. 197

Although that same year the clear and present danger test was accepted by a unanimous court in <u>Debs v. United States</u>, later that year (1919) in <u>Abrams v. United States</u> Holmes himself (along with Justice Brandeis) dissented from the Court's application of the test. Finally, years later in 1951, in <u>Dennis</u> v. <u>United States</u>, 200 the Court redefined the clear and present danger test into one that has been called a "probable danger" test:

In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. 201

In the civilian sphere, use of the test (still called the "clear and present danger" test and <u>not</u> the "probable danger" test) is now apparently limited to contempt citations relating to the

<sup>197</sup> Id. at 52.

<sup>198249</sup> U.S. 211 (1919).

<sup>199&</sup>lt;sub>250</sub> U.S. 616 (1919).

<sup>&</sup>lt;sup>200</sup>341 U.S. 494 (1951).

<sup>201</sup> Id. at 510, guoting 187 F.2d 201, 212 (2d Cir. 1950).

judicial process; 202 but as will be developed later, it is the major test employed by the Court of Military Appeals in deciding issues where the individual serviceman's right of free speech is to be balanced against the needs of military discipline. Thus the test is by no means "dead."

But there are other tests.

First there is the "absolute" test--that the First Amendment's prohibitory language means exactly what it says. This test is one which is easy to apply, since it is very "black and white"; but since the legal issues involved are rarely so colored, it is not surprising that a majority of the Court has never adopted the test. Indeed, as noted earlier, it was rejected by Justice Holmes in Schenck—the very first case where the Court began to give any meaningful analysis to the scope of the First Amendment. Over the years only Justice Black has consistently adhered to the absolute test; his opinion in his last major First Amendment decision, United States v. New York Times, 203 still reflects his view. With his death, it is safe to say that the absolute test has gone as well.

There is also the "bad tendency" test. In 1925 in Gitlow v. New York, 204 the Court used many different phrases

<sup>202</sup>Wood v. Georgia, 370 U.S. 375 (1962).

<sup>&</sup>lt;sup>203</sup>403 U.S. 713, 718-719 (1971).

<sup>204&</sup>lt;sub>286</sub> U.S. 652 (1925).

in its opinion, but the gist of its view was that

a State in the exercise of its police power may punish those who abuse this freedom [granted by the First Amendment] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace. 205

However, the "bad tendency" test was rejected by the Court in Dennis v. United States, 206 and it has not been revived since.

In 1937 in <u>DeJonge v. Oregon</u>, <sup>207</sup> the Court enunciated another test, which is now called the "incitement" test:

[First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. 208

The impreciseness of this test is made most clear by Justice Holmes' comment in <u>Gitlow v. New York</u> that "Every idea is an incitement." Notwithstanding, the test has survived and was obliquely referred to by the Court in its 1966 decision in Bond v. Floyd. 210

However, the major test which has evolved is the "balancing" or "ad hoc balancing" test. It first appeared in 1950

<sup>205</sup> Id. at 671.

<sup>206341</sup> U.S. at 510.

<sup>207&</sup>lt;sub>299</sub> U.S. 353 (1937).

<sup>208</sup> Id. at 364.

<sup>209&</sup>lt;sub>286</sub> U.S. 652, 673 (1925) (dissenting opinion).

<sup>210385</sup> U.S. 116 (1966).

in American Communications Association v. Douds. 211 After coming to the same conclusion as Justice Holmes' starting point in Schenck—that the First Amendment is not an absolute—the majority opinion reached the conclusion that the best means to determine when the Government could lawfully prohibit speech in the face of the amendment's prohibitory language was to balance the interests concerned:

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. 212

Although this test was seemingly rejected by a majority of five members of the Court in a footnote at the end of the majority opinion in <u>United States v. Robel</u> in 1967, 213 there is no doubt that it is the test used today in most cases involving the First Amendment.

In addition to all the foregoing tests, it is standard Supreme Court practice to avoid deciding constitutional issues if another means of decision can be employed. Thus it is not surprising to find that the Court has avoided making First Amendment decisions as such in a number of cases where a clear First Amendment issue was presented. The most frequently-used

<sup>211&</sup>lt;sub>339</sub> U.S. 382 (1950).

<sup>212&</sup>lt;u>Id</u>. at 399.

<sup>213389</sup> U.S. 258, n.20 at 268 (1967).

too vague, <sup>214</sup> or that it is overly broad. <sup>215</sup> In other cases, the Court has found the evidence of fact or intent insufficient, or it has sometimes phrased its decision in terms that the Government did not meet its burden of proof. <sup>216</sup> While the application of these other bases of decision has often had the factual result of giving fuller protection to the First Amendment right in question, their use has done little to advance an understanding of what is constitutional and what is not in relation to the First Amendment.

What emerges from the foregoing brief analysis is a constantly-shifting pattern of decision—the use of one test or another, interlaced with the use of other standards (such as vagueness)—when the Supreme Court has dealt with First Amendment problems. The result has been almost total confusion. Legal commentators assert the "firstness" of the First Amendment.

They argue in article and counter—article about what

<sup>214</sup> See, e.q., Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589; Cox v. Louisiana, 379 U.S. 536 (1965); Badgett v. Bullitt, 377 U.S. 360 (1964); Edwards v. South Carolina, 372 U.S. 229 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Winters v. New York, 333 U.S. 507 (1948); Cantwell v. Connecticut, 310 U.S. 296 (1940).

<sup>215</sup> See, e.q., Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Staub v. City of Baxley, 355 U.S. 313 (1958); Cantwell v. Connecticut, 310 U.S. 296 (1940).

<sup>216</sup> See, e.q., Speiser v. Randall, 357 U.S. 513 (1958); Yates v. United States, 354 U.S. 298 (1957); Hartzel v. United States, 322 U.S. 680 (1944).

<sup>217</sup>Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956).

the amendment means. 218 They write comments of length and weighty pronouncement about just one of the tests listed above. 219

best answer is that there really are none. Certainly there are the various "tests"; but what circumstances dictate the use of one test as opposed to another is almost anybody's guess. Indeed, the Supreme Court has been criticized for its failure to develop any rational system whereby one could ascertain which way the balance should swing. The best criticism in this regard is found in the opening pages of The System of Freedom of Expression. Although somewhat lengthy to be quoted in full, the analysis is so clear that full quotation is warranted:

The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases. At various times the Court has employed the bad tendency test, the clear and present danger test, an incitement test, and different forms of the ad hoc balancing test. Sometimes it has not clearly enunciated the theory upon which it proceeds. Frequently it has avoided decision of basic First Amendment issues by invoking doctrines of vagueness, overbreadth, or the use of less drastic alternatives.

Frantz, The First Amendment in the Balance, 71 Yale
L.J. 1424 (1956); Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Cal. L. Rev. 821 (1962);
Frantz, Is the First Amendment Law?—A Reply to Professor
Mendelson, 51 Cal. L. Rev. 729 (1963).

<sup>219</sup> See, e.g., Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 Stan. L. Rev. 1163 (1970).

Justice Black, at times supported by Justice Douglas, arrived at an "absolute" test, but subsequently reverted to the balancing test in certain types of cases. The Supreme Court has also utilized other doctrines, such as the preferred position of the First Amendment and prior restraint. Recently it has begun to address itself to problems of "symbolic speech" and the place in which First Amendment activities can be carried on. But it has totally failed to settle on any coherent approach or to bring together its various doctrines into a consistent whole. Moreover, it has done little to deal with some of the newer problems, where the issue is not pure restraint on government interference, but rather the use of governmental power to encourage freedom of expression or the actual participation by government itself in the system of expression.

It is not surprising that this chaotic state of First Amendment theory has produced some unhappy results. The major doctrines applied by the Supreme Court have proved inadequate, particularly in periods of tension, to support a vigorous system of freedom of expression. Thus the bad tendency test offers virtually no protection to freedom of expression. clear and present danger test is not only inapplicable in many situations but permits the government to cut off expression as soon as it comes close to being effective. The incitement test is open to much the same objections. The ad hoc balancing test is so unstructured that it can hardly be described as a rule of law at all. All the tests are excessively vague, little more than exercises in semantics. Efforts of the courts to deal with the more complex theoretical problems, such as "symbolic speech," have only made the situation worse. All in all doctrinal support for the system of freedom of expression is in a sad state of disarray. And this has had a most unfortunate effect upon the work of the lower Federal and State courts, upon the performance of government of ficials, and upon the understanding of the public. 220

Although Mr. Emerson was discussing the law concerning freedom of expression generally, an equal degree of lack of order pervades the area of the law of freedom of religion as well,

<sup>220</sup> Emerson at 15-16.

as shall be discussed later. Sometimes the same tests are used in a freedom of religion problem to seek to balance the competing interests concerned.

Mr. Emerson sets as the goal of his book the formulation of a means (a "system") whereby some order may be made out of chaos. Yet he specifically states that "the operations of the military" fall outside his system, simply because the considerations involved "are different from those in the main system, and that different legal rules may therefore be required." This is clearly evocative of the rule which has evolved concerning a serviceman's rights under the Bill of Rights in general—namely, that while the Bill of Rights applies to servicemen in general, it applies "differently." To explore those differences is the goal of this paper.

While Mr. Emerson's book deals with the issue of free-dom of expression only, he employs an analytical scheme which will be adopted in this discussion. Mr. Emerson adopts a distinction between "expression" and "action." Expression" means beliefs and opinions which result in the communication of ideas, for whatever purpose. "Action" represents other forms of conduct, which, although possibly motivated by the same opinions and beliefs which might motivate expression, go beyond mere expression and communication of ideas. This dis-

<sup>221</sup> Id. at 19-20.

<sup>222</sup> Id. at 18.

tinction is an important analytical device. As Mr. Emerson explains its importance,

in order to achieve its desired goals, a society or the state is entitled to exercise control over action—whether by prohibiting it or by compelling it—on an entirely different and vastly more extensive basis. But expression occupies an especially protected position. 223

This distinction between expression and action is similar to that which Professor Chafee apparently had in mind in his much earlier article when he analogized the proper prohibition of conduct which involves speech to the common law rules concerning attempted crimes. Attempted crimes are punishable by law when the conduct proceeds past mere preparation and becomes action. Thus, while not articulated in Mr. Emerson's terms, Mr. Chafee appears to be drawing the same line. 224

As will be discussed in detail later, in the military one's opinions and beliefs, religious or otherwise, are no defense to the disobedience of lawful military orders. When one's beliefs translate themselves into action contrary to such orders, or into refusing to comply with lawful orders, those beliefs form no defense to punishment for the disobedience involved. Thus in the military sphere, to distinguish between "expression" and "action" will be a highly useful analytical device.

<sup>223</sup> Id. at 8.

<sup>224</sup>Chafee, Thirty-Five Years with Freedom of Speech, 1 U. Kan. L. Rev. 1 (1952).

Although neither Mr. Emerson nor Mr. Chafee was discussing freedom of religion in establishing their difference between "expression" and "action," it is submitted that in discussing freedom of religion, the same delineation may be applied. While the Government may have a low priority of interest in regulating the way in which one "exercises" his religion, when religious beliefs take the form of action which impinges on society's interests, the Government's right to regulate that action will be the same as with any other form of action which might harm society. Again, the military would say that when one's religious beliefs translate themselves into "action," the religious belief will not be a defense to a disobedience of lawful orders. The value of the distinction as an analytical device again becomes apparent.

Accordingly, throughout the remainder of this paper, the word "action" will be used to convey the idea of forms of conduct other than the mere communication of ideas ("expression"), or the mere "exercise" of religion.

# C. Does the First Amendment Apply to Servicemen?

Part I of this paper discussed constitutional claims arising in the context of courts-martial. We saw that the law has developed to say that the Bill of Rights applies to servicemen, except where either expressly or by necessary implication inapplicable.

However, of all the ten amendments to the Constitution which comprise the Bill of Rights, the First Amendment is unique. It is the only one which gives a direct mandate to Congress alone concerning certain actions which Congress shall not take. Thus it does not exactly establish "rights" for individuals. Any "rights" which individuals have are derivative from the prohibitions imposed on Congress. Further, by definition, it is clearly inapplicable to the President. When the First Amendment was drafted, probably the only group of people whom the President could affect without some sort of Congressional authority was servicemen—and nobody supposed that the First Amendment applied to them, anyway. Is there anything in this situation which makes the First Amendment either expressly or by necessary implication inapplicable to servicemen?

Congress has enacted the Uniform Code of Military Justice. Any provisions of that criminal statute which directly conflict with the First Amendment would be definition be unconstitutional. The Code directly reflects the situation wherein the First Amendment's language is unqualified: "Congress shall make no law . . . ." In this context, the most obvious example of a conflict between the First Amendment and the Uniform Code is Article 88, which will be discussed at length later. The point here is, however, that it is clear from the language of the First Amendment itself that its constraints

apply to the Uniform Code of Military Justice, which is an act of Congress.

In addition to the fact that the Uniform Code may by its very contents pose a problem of First Amendment limitations on Congress, there is another and much more common way in which the First Amendment impinges on the military. The Uniform Code is the major device whereby military orders are enforced. It punishes through various articles almost any kind of disobedience of orders. This machinery exists regardless of who the order-giver is, be he the President in his capacity as Commander-in-Chief, or be he a corporal in charge of an Army squad. Suppose a very religious commander imposed the requirement that all members of his command attend a religious service every week that the individual was present for duty within the command. And further suppose that Captain X were sleepy one Sunday morning and that he did not attend any religious service that day or any other day that week. The commander now desires to enforce his order. Clearly he cannot physically carry Captain X to church. Thus what he does is punish Captain X for disobeying the order. And the means he uses to achieve that punishment -- as enforcement -is the Uniform Code. But since the Uniform Code is a creature of Congress, and Congress' power to enact it is limited by the First Amendment, no punishment could lawfully be imposed on Captain X in this case. The power of Congress simply cannot

be used to enforce an order which Congress itself could not make law. Put another way, the order itself would be unlawful.

Apart from <u>enforcing</u> military orders, directives, and regulations, there is a quite academic but also quite interesting problem involved in this area. The First Amendment states that <u>Congress</u> shall make no law abridging certain rights. Does that mean that the <u>President</u> has the power to require, say, every serviceman to attend a religious service at least once each week?

Before actually examining this question, which really turns on the scope of the President's powers as Commander-in-Chief, it must be stressed that under the current factual and legal posture of things, the problem is strictly academic.

It is, however, most interesting and therefore worth discussing.

A proper consideration of the problem of the scope of the President's power as Commander-in-Chief hinges in part on a distinction between the scope of his powers in that regard and Congress' powers to make rules and regulations concerning the Armed Forces. The President is designated Commander-in-Chief of the Armed Forces by Article II, § 2 of the Constitution. Further, the President is clearly not equated to Congress in the constitutional scheme of things. Thus <u>independent</u> actions taken by the President and his subordinates (as distinguished from their exercise of powers given to the Executive

by Congress) are excluded, by definition, from the constraints of the First Amendment. It must be remembered that the amendment reads "Congress shall make no law . . . . " (Emphasis added.) On the other hand, Congress has been given by the Constitution, in Article I, § 8, clause 14, the power "To make Rules for the Government and Regulation of the land and naval Forces." (Emphasis added.) Thus whatever "command" powers the President has as Commander-in-Chief must be differentiated from Congress' "governing" and "regulating" powers. However, this differentiation is not necessarily a recognized one; indeed, there is clear historical disagreement (to be discussed in more detail shortly) that there is any distinction at all. Moreover, military men are taught that the responsibility of "command" is total--that it includes responsibility for every facet of the proper functioning of the military organization. That means not only the tactical aspects of "command" but also even religious matters and other matters of "government" and "regulation." Thus to the military man, a distinction between the concepts of "command" on the one hand and "government" and "regulation" on the other hand simply does not exist. Nor, indeed, can any civilian or military court opinion be found which draws the distinction.

with all that aside, it also should be noted that it would not necessarily matter whether the President himself issued the hypothetical order or directive in question, or whether some subordinate officer within the military hierarchy

commander-in-Chief who actually issues any military order or directive. This is the long-established concept of the "chain of command"; 225 it is really nothing but another way to say that the President's powers as Commander-in-Chief are delegated down, echelon by echelon, to the lowest-ranking non-commissioned officer. Thus the hypothetical problem concerning the President's powers includes the powers of all military officers and noncommissioned officers.

Again, the problem is whether military orders and directives can be intrinsically valid, even though they "abridge" First Amendment freedoms, because such orders come from the President's powers as Commander-in-Chief and are therefore outside the First Amendment, by definition. Do the President's powers as Commander-in-Chief go so far? Or, to ask the question another way, can he and his subordinates give directives which are intrinsically lawful, even though such orders might conflict with the First Amendment?

The answer to this question must, in the author's opinion, lie in the proper relationship between the President's
powers as Commander-in-Chief and Congress' powers to "govern"
and "regulate" the Armed Forces. In comparing the two powers,
the President's power as Commander-in-Chief must mean that he
has only "tactical" command powers, with all the necessary

<sup>225</sup>United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

powers appurtenant thereto—such as the movement of individuals from one place of duty to another, the prescribing of the means whereby they shall be trained, etc. It also should include the authority to appoint officers to serve under his command, and presumably the authority to remove anyone from the military service. 226 In other words, the President is the "ultimate" commander. The relations between President Truman and General MacArthur during the Korean War most clearly demonstrate this. But when it comes to the day—to—day "housekeeping" operations of the military establishment—to their "government" or "regulation," if you will—that power belongs to Congress, as the Constitution expressly provides.

Thus in requiring the members of the military to go to church at least once a week, such a requirement cannot be said to relate to the tactical operations of the military. Instead, it clearly amounts to a matter of "government" or "regulation." While the President and his subordinates could presumably order any serviceman to go to a particular military installation and assign him specific military duties there, they could not require him either to go to church or to refrain from attending church at all times. That would simply be beyond the President's powers; matters of "government" and "regulation" are Congress' responsibility. And of course the order would be illegal, under

<sup>226</sup> The use of the word—"presumably" is intentional, as there is some doubt on this point. See p. 133, infra.

Congress' authority, because Congress is bound by the First Amendment.

However, as noted earlier, there is no authority which can be pointed to which makes this distinction between the President's and Congress' powers. Further, there is authority to the contrary. The most clear statement of the contrary opinion is in the historic treatise on military law by Colonel William Winthrop, Military Law and Precedents. Concerning the powers of the President, Winthrop had the following to say:

[T]he President is invested with a general and discretionary power to order statutory courts-martial for the army, by virtue of his constitutional capacity as Commander-in-chief, independently of any article of war or other legislation of Congress. 228

After reviewing the historical precedents of the power of the sovereign to convene courts-martial as a prerogative of his executive command function, Winthrop went on to discuss the impact of the contents of the United States Constitution as it relates to the President and Congress in their respective roles relative to overall control of the military establishment. He wrote:

The Constitution had indeed vested in the new Congress the power to legislate for the regulation and government of the army, but this provision could not rightly be regarded as per se militating against the exercise of an authority properly inhering in a function devolved by the same instrument upon the Executive, and which

<sup>227</sup>w. Winthrop, Military Law and Precedents (2d ed., 1920 Reprint).

<sup>228</sup> Id. at 57 (emphasis in original).

had been attached to that function by the previously-existing law and usage. 229

In addition to the President's "inherent" power to convene courts-martial, independently of Congress, Winthrop finds that the President also has independent power with regard to the promulgation of regulations to govern the military.

Winthrop wrote:

The authority for army regulations proper is to be sought--primarily--in the distinctive function of the President as Commander-in-chief and as Executive. His function as Commander-in-chief authorizes him to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to ensure order and discipline in the army. 230

After referring to a delegation of power from Congress to the President authorizing him to prescribe regulations for the "government" of the army, and noting that the first such statute was enacted in 1875 (in substantially the same language as today in 10 U.S.C. § 3061 (1970)), 231 Winthrop goes on to say that the President

may, in the due exercise of the laws for the government of the army, make needful and proper regulations without any legislative authority whatever, similarly as he may give orders as commander-in-chief. A statutory authority for general army regulations is indeed mainly useful and significant as a justification of such expenses as it may be necessary to incur from time to time in the publication of the regu-

<sup>229</sup> Id. at 59.

<sup>230</sup> Id. at 27.

<sup>231</sup> Id. at 31.

lations, since it implies that the requisite appropriations for the same will be made by Congress.

But, whether or not resting upon any express authority of statute, the <a href="legal effect">legal effect</a> of army regulations . . . is, as already indicated, simply that of executive, administrative, instrumental rules and directives as distinguished from statutory enactment. 232

The upshot of Winthrop's view is that the President has an inherent and independent power both to convene courts—martial and to promulgate regulations to "govern" the military. These powers come to him through his Commander—in—Chief status. If Winthrop be correct, then servicemen do not have any First Amendment rights, whenever action is taken by the President based on his independent powers as Commander—in—Chief. The First Amendment applies only to Congress.

Winthrop's position is buttressed by the 1842 Supreme Court decision in <u>United States v. Eliason</u>. 233 The issue there was whether Eliason was owed certain sums of money. He claimed that he was entitled to certain compensation based on certain Army regulations. However, after promulgation of the regulations, Congress passed a law denying compensation of the type concerned to military officers. The military ruled that this law cut off all claims, even for work actually performed prior to the act of Congress, which work would have been allowed compensation under the old Army regulations. Thus it refused to

<sup>232</sup> Id. at 31-32.

<sup>233</sup> See supra, n. 225.

pay Eliason. The Supreme Court refused to look at the propriety of the military ruling in the case. Although the directive cutting off all future payments was purely an administrative decision, the Court ruled that it was a decision by a subordinate (the Secretary of War) of the President, who was exercising the President's delegated powers. As such, the Court ruled that the executive decision was immune from judicial review, under the concept of executive privilege. This view is, in essence, the same as that propounded by Winthrop. Certainly had the Court found the regulation to be only a delegation of Congress' power, judicial review would have ensured. And, indeed, the lower court had so found and had ruled that since Congress never intended that result, the executive decision was erroneous.

However, perhaps Winthrop does not go so far as it would seem from the discussion thus far. Winthrop also says that military orders, regulations, and directives are "lawful" only insofar as they do not conflict with the Constitution or an act of Congress. This would appear to mean that Congress can indeed limit the President's powers to "govern" and "regulate" so long as it (Congress) acts constitutionally and does not encroach on the President's power to "command."

The point where one must disagree with Winthrop is the significance (or, really, the <u>lack</u> of significance) which

<sup>234</sup>winthrop, supra, n. 227, at 33.

winthrop attaches to the fact that Congress has <u>delegated</u>
to the President its "governing" and "regulating" powers.

These acts are now codified, relative to each of the services, in a series of provisions of the United States Code. 235 winthrop saw this delegation of power as meaning only that Congress would pay to print the regulations. However, it surely must mean more than that. Anglo-American law has always held that one cannot delegate more authority than one himself has, and conversely that any limitations on one's authority are applicable to an individual to whom the delegation is made. That theory is as applicable to a delegation of authority by Congress to the President as it is between two private individuals. Congress cannot free the President and his subordinates of the constraints of the First Amendment, simply by delegating its powers to him and his military officers.

235 For the Army:
10 U.S.C. § 3061 (1970): "Regulations. The President may prescribe regulations for the government of the Army."

For the Air Force:
10 U.S.C. § 8061 (1970): "Regulations. The
President may prescribe regulations for the government of
the Air Force."

For the Navy and Marine Corps:

10 U.S.C. § 121 (1970): "Regulations. The President may prescribe regulations to carry out his functions, powers, and duties under this title."

10 U.S.C. § 6011 (1970): "Regulations. United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President."

10 U.S.C. § 6012 (1970). "Additional Regulations for the Marine Corps. The President may prescribe military

regulations for the discipline of the Marine Corps."

The limitations imposed on Congress fall on the President as well, when the President is acting pursuant to the color of his delegated powers. Thus the constraints of the First Amendment impose limitations on the powers of the President and his subordinates, as well as on Congress, when the President acts under his delegation from Congress.

Thus the hypothetical question under discussion could be squarely presented only if the President were to claim that he was acting on his own independent authority (either because Congress had not delegated him any authority in the particular area, or because Congress had not limited his authority in the particular area). And, making that claim of independent authority, the President would have to issue an order or directive inconsistent with the First Amendment. But if the President always acts under the delegation of Congress' authority to him, as contained in the United States Code, then his acts must always be tested by whatever limits there are on Congress' authority. And, of course, since Congress is limited by the First Amendment, the President would be as well.

Assume then that the President made a claim that his order requiring every serviceman to attend religious services at least once each week was issued only on the authority of his "command" powers, and independently of Congress. Suppose he also claimed that the order was not issued pursuant to any delegation of Congress' powers, nor in violation of any limitation imposed on him by Congress. If this issue were pre-

met the issue, what would be likely to ensue?

First, the Court could rule that there is a distinction between the President's power to "command" the military and Congress' powers to "regulate" and "govern" the military. This would mean that the Court would have to rule that the President's powers to "command" do not include an inherent power either to promulgate directives which "regulate" and "govern," or indeed even to convene a court-martial separate and apart from the Uniform Code of Military Justice. Only by so ruling would the Court allow the First Amendment to apply directly to servicemen. To allow the President to exercise a "governing" and "regulating" authority, to include a courtmartial authority, independent of statute, would simultaneously allow him to act independently of the First Amendment. With the preference for constitutional values being what it is, even for servicemen, it seems highly unlikely that the Court would allow the President to act independently of the First Amendment.

However, what if the Court did not accept the theory differentiating between "command" authority on the one hand, and "governing" and "regulating" authority on the other? It should be stressed again that there is no authority which necessarily requires the distinction. What other results could ensue, if the Court decided against making the distinction between the two powers?

One might argue that surely the President is bound by the Constitution, and therefore that the whole point is moot; that whatever the President does must be tested by the Constitution. This is of course true. But, as noted many times earlier, the language of the First Amendment renders it inapplicable to the President. Thus the Court could not reasonably hold the President to be bound by the First Amendment, and nothing more. Thus are there any other routes whereby the Court could make the First Amendment apply to the President when he sought to exercise his powers over the military, independently of Congress?

It has been noted earlier also that a court-martial is the primary means whereby orders are enforced. It also has been noted that Winthrop believed the President has the power to convene courts-martial <u>independently of</u> Congress. Assume that that had happened and the case is now before the Supreme Court on habeas corpus. Certainly a court-martial is a criminal prosecution which can result in the loss of life, liberty, and property. This fact directly brings into play the provisions of the due process clause of the Fifth Amendment. That amendment is not couched in language which is applicable only to Congress. Its use of the passive tense makes it applicable to any branch of the Government which accomplishes the forbidden results. Thus if the President exercised his power to convene, independently of Congress, a court-martial

for the purpose of punishing the breach of a directive which was inconsistent with the First Amendment, the Fifth Amendment's due process clause would apply.

At this point, either of two results could ensue. First, the Court could say that the due process clause of the Fifth Amendment, in the military court-martial context, incorporates the provisions of the First Amendment. The logic would be similar to saying that the due process clause of the Fourteenth Amendment incorporates the provisions of the First Amendment for the purposes of State criminal prosecutions. In the alternative, the Court could seek to define due process for courts-martial. It should be remembered that when the Court of Military Appeals initially discussed this problem, it coined the phrase "military due process," and it defined that phrase as those rights and procedures granted by Congress in the Uniform Code of Military Justice. 236 Since that time, as discussed in Part I of this paper, the Court of Military Appeals has also incorporated the provisions of the other portions of the Bill of Rights, insofar as they are not inapplicable to servicemen either expressly or by necessary implication. 237 If the Supreme Court adopted this definition of military due process in determining what limitations there were on the

<sup>236</sup>United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

<sup>237</sup> United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

President's independent powers to convene courts-martial, it would in effect throw the President back within the Uniform Code, to include all the precedents established by the decisions of the Court of Military Appeals. While this is clearly a round robin, it would accomplish the dual function of simultaneously recognizing the President's "inherent" authority to convene courts-martial, yet also require those trials to be (in essence) legally identical to any other court-martial. Since, as noted above, the Court of Military Appeals simply assumes that the provisions of the First Amendment apply to military directives, regulations, and orders, this decision by the Supreme Court would cause the First Amendment to apply to "presidential" courts-martial as well.

There is a further problem. The President's "inherent" authority to issue governing regulations could similarly be held by the Supreme Court to exist, yet be subject to the due process requirements of the Fifth Amendment. On an administrative plane, this could mean that the provisions of the First Amendment could be deemed "incorporated" into military due process. However, it should be stressed that the President's power per se to promulgate governing regulations is not nearly so critical an issue as is his power to enforce whatever regulations and orders exist. The traditional way that such enforcement is made is through the court-martial system. Even if oral orders are given in individual cases to comply with

higher directives, the disobedience of those orders also is traditionally punished through courts-martial. However, are there any other means whereby infractions could be enforced, so that the constraints of the First Amendment would not apply, as they would to courts-martial?

It was noted earlier that the President presumably has the authority as Commander-in-Chief to dismiss officers. 238

On what grounds? By what standards? If the President promulgated a regulation requiring all officers to attend religious services once a week, could he dismiss an officer for his re-

<sup>238</sup>The discussion in this regard is limited only to officers, since the Tenure of Office Act, 10 U.S.C. § 1161(a) (1970), purports to limit the President's powers to dismiss officers but is silent concerning enlisted personnel. Further, Article 4 of the Uniform Code of Military Justice recognizes the right of an administratively dismissed officer to demand trial by court-martial, but confers no similar right on enlisted personnel. For a review of arguments that certain statutes do affect enlisted personnel in this context, see Pasley, Sentence First, Verdict Afterwards: Dishonorable Discharge without Trial by Court-Martial, 41 Cornell L.Q. 545 (1956).

This is not to say that enlisted personnel have never been discharged with a less than honorable discharge through a procedure other than those authorized by Congress; they have. See Bell v. United States, 366 U.S. 393, n. 1 at 395 (1961), which is the case that forms the basis of the discussion in the Cornell Law Quarterly article referred to immediately above. The suit in Bell was for back pay from the time Bell and others had been captured during the Korean War until the date of their discharge, which was administratively effected when they refused repatriation. Because the suit did not request back pay from the time of the discharge to the time of repatriation, the Court ruled that the validity of the discharge was not in issue. However, there is no reason to believe that Justices Douglas' and Black's dissent in Beard v. Stahr, 370 U.S. 41 (1962) (per curiam), at 43 (dissent), would apply only to officers; Justices Douglas and Black opined that the President cannot impose administrative discharges under less than honorable conditions, except as authorized by Congress.

such power in the President in peacetime; it does not deny such power in time of war. 239 While it is debatable that Congress can constitutionally limit the President's power in this regard in peacetime, 240 for discussion purposes assume that the President seeks to dismiss an officer for a First Amendment-protected action, during time of war. Under those circumstances, could a refusal to comply with a directive which was contrary to the First Amendment be enforced by dismissal by the President of the officer?

It should be noted that the word "dismissal" is a term of art in the military sphere. Traditionally, it means the severance from office of a military officer by sentence of court-martial. It does not apply to discharges of enlisted personnel, and it cannot be given administratively—except directly by the President. It is in this latter context that

<sup>&</sup>lt;sup>239</sup>10 U.S.C. § 1161(a) (1970).

<sup>240</sup>The early cases do not appear to question the validity of the limitations imposed by the Tenure of Office Act. Furthermore, they are the only cases where the majority opinion of the Court discusses the Act. See Weiner v. United States, 357 U.S. 349 (1958), and Black v. United States, 103 U.S. 227 (1880). The other references to the matter are in dissenting opinions. See Beard v. Stahr, supra n. 238, and Meyers v. United States, 272 U.S. 52 (1926) (dissenting opinion). This last case held unconstitutional a statute providing that postmasters could be removed from office only upon the advice and consent of the Senate. Justice Brandeis, dissenting, commented: "We need not consider what power the President, being Commander in Chief, has over officers of the Army and Navy."

the Tenure of Office Act uses the word. However, in recognition of the close relation of the word to courts-martial, and the consequent stigma that it carries, Article 4 of the Uniform Code of Military Justice gives any officer dismissed administratively by order of the President the right to demand trial by court-martial. If the demand is met and the court-martial either acquits the officer or does not sustain the sentence to dismissal, or does not impose a death sentence, the article provides that the dismissal must be set aside and that an administrative form of discharge certificate must be substituted therefor. If the demand for trial is not met within six months, the article requires that the administrative form of discharge certificate must automatically be substituted for the dismissal.

Thus if the hypothetical officer demanded and got a court-martial for not going to church, he should be acquitted, since his action was protected by the First Amendment. However, this would not necessarily get him reinstated in the military service: The law only requires that his discharge be administratively recharacterized, but not that his office be reinstated. Indeed, if another officer has been appointed to fill his vacancy, even the Supreme Court concurs that he is "out." Notwithstanding, it can be said that the offi-

<sup>241</sup> See Wallace v. United States, 257 U.S. 541 (1922), and Blake v. United States, 103 U.S. 227 (1880).

cer's First Amendment rights are to a degree protected--at least to the extent that he would not be "dismissed" for exercising them.

The result is that the officer indeed stands to lose his commission for exercising his First Amendment rights. However, it should be noted that research has revealed only one case where the officer in question was out-and-out dismissed by the President, independent of a court-martial sentence—and the orders effecting his dismissal were dated 13 February 1918. Thus while the possibility exists that officers could be dismissed other than by court-martial, in actual practice the exercise of that method appears extremely remote.

As to both officers and enlisted personnel, there is another problem. Clearly the military has vast administrative control over the lives and living conditions of its personnel. The comments by Judge Moore quoted in the introduction to this paper clearly demonstrate that control. And it has been noted above that the President's power as Commander-in-Chief clearly encompasses the right to transfer personnel, assign them to particular duties, and the like. What if those powers were exercised either to prohibit, limit, or in effect punish actions by a serviceman which were actually protected by the First Amendment?

<sup>242</sup>Wallace v. United States, 257 U.S. 541, 542 (1922).

These were the allegations made in the recent case of Cortright v. Resor. 243 The district court found Cortright's allegations worthy and enjoined the Army from transferring him to another post within the United States. The court of appeals reversed, saying:

We do not say that a case could never arise where a transfer order could be invalidated by a civilian court on [a constitutional] basis. But any such judicial intrusion into the area broadly defined by the Constitution to the President as commander-in-chief and his authorized subordinates must await a stronger case than this one. 244

As its authority for so ruling, the court of appeals cited Orloff v. Willoughby, 245 and noted that no court, following Orloff's decision, had ever ordered the reversal of military duty orders, except the district court in the instant case. The facts in the Cortright case will be discussed in detail later in this paper. The importance of the case for the purposes of the present discussion, however, is that the case in the court of appeals clearly bottoms itself on the President's command power. And it holds that power virtually beyond judicial review, except in the most extreme cases.

<u>Cortright</u> also gives rise to another problem, apart from the extreme of transfer to another military installation.

<sup>243447</sup> F.2d 245 (2d Cir.), reversing 325 F. Supp. 797 (E.D.N.Y. 1971).

<sup>244</sup> Id. at 246.

<sup>245345</sup> U.S. 83 (1953).

Cortright was a member of an Army band. The band as a whole apparently had a fairly easy time of military life--until, as a result of certain anti-Vietnam war protest activities, their duty assignments were changed. Where previously they were not required to be present for duty on a full eight-hour basis, they were so required to be present; where they did not have to stand the traditional six-in-the-morning reveille formation, they were required to do so; where they were exempt from performance of "full" police (clean-up) details, the exemption was withdrawn; and where they had been allowed to give private music lessons during duty hours, that privilege was terminated. The court of appeals in Cortright mentioned these actions by the military command only in passing, as it were, to explain subsequent events. The court did hold that the actions were lawful, since they merely placed the band in a military posture in which it could have lawfully been placed all along. Notwithstanding, from the band members' point of view, the withdrawal of certain privileges and the imposition of other and more demanding military requirements could with some justification be viewed at least as harassment, if not punishment, for their anti-war protest activities. Indeed, the court of appeals itself found that the duty changes caused such a drop in morale within the band that the morale of the unit could be restored only by "breaking up" the existing composition of the band and by transferring Cortright and some others. Although not articulated, the essence of the court of appeals' decision

is that such actions by the military are also beyond judicial review, except in extreme cases.

The result is the possibility that restrictive conditions—at least conditions more restrictive than in the past can be imposed for the exercise of First Amendment rights.

It was stated at the beginning of this portion of the discussion that the problems involved here are more academic than real. The paucity of court decisions in the area demonstrates this, from a factual, statistical point of view. But the real reason why the problem is academic is that the President simply makes no claim that he promulgates orders and directives independently of Congress' delegation of authority to "govern" and "regulate." In other words, both the President and the courts simply assume that the President acts pursuant to the delegation of Congress' "governing" and "regulating" powers. The language always employed by the courts--especially by the Court of Military Appeals -- is that the order or regulation is "legal" or "illegal." 246 Obviously an order or directive not authorized by the statute pursuant to which it is issued would be "illegal." But that idea, and its consequent language of "legal" or "illegal," could never be employed if there were no statute which formed the basis of the action.

Reed v. Franke 247 illustrates the attitude of the courts

<sup>246</sup> See, e.q., United States v. Wysong, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

<sup>247297</sup> F.2d 17 (4th Cir. 1961).

most interestingly. There the validity of a Navy regulation was challenged. The Government made no claim that the regulation was issued independently by the President as Commander-in-Chief. It claimed, rather, that the regulation was issued pursuant to the authority of 5 U.S.C. § 22 (1970), which authorizes the "head of a department" to issue regulations of the kind in question. The court interpreted the word "department" in 5 U.S.C. § 22 to mean an Executive agency headed by a Cabinet member -- and therefore that it did not include the Secretary of a military department, such as the Secretary of the Navy. But the court did not leave the matter there; it went on to say that the real statute which authorized the issuance of the regulation was 10 U.S.C. § 6011 (1970) 248--which is the statute where Congress' "governing" and "regulating" powers over the Navy are delegated to the President. The court then went on to determine whether the regulation in question had been properly promulgated, pursuant to the statute it found applicable; and, finding that it had been lawfully promulgated, the court went on to decide the case accordingly. The interesting thing about Reed v. Franke is that the Government first made no claim that the regulation had any "independent" validity, apart from a delegation of Congressional authority; and further, the Government cited the wrong statute as the basis for its delegated authority!

<sup>248</sup> See supra, n. 235.

So long as the courts, and especially the Court of Military Appeals, continue to assume that military directives are not promulgated independently but only and always through a delegation of Congress' powers, the problem of the inherent power of the President and the ramifications thereof as discussed above are largely academic. Clearly this is true, so long as the orders and directives in question are sought to be enforced through the court-martial system, where the provisions of the First Amendment are uniformly held to apply. It is less clear where the actions are strictly administrative, as in the Cortright case.

From the entire foregoing discussion, three principles emerge:

First, whenever the Uniform Code of Military Justice is used as the mechanism to enforce military orders, the individual is fully protected as to his First Amendment rights. Since the Uniform Code is an act of Congress, the First Amendment applies on its own terms, by definition. In addition, so long as everyone continues to assume that the President makes all his "governing" and "regulating" actions pursuant to a delegation of Congress' authority, again there is no difficulty in holding that the First Amendment's limitations apply.

Second, if the President were to convene a court-martial purportedly on his own independent authority as Commander-in-Chief, in contrast to a court-martial convened pursuant to the

Uniform Code of Military Justice, although there is no decision in point, that "Presidential" court-martial would in one way or another probably be held to the same First Amendment limitations as a court-martial convened under the Uniform Code of Military Justice. Research has not provided an instance of a court-martial directed by the President, independent of the Uniform Code. Factually, therefore, enforcement through the Uniform Code is virtually a universal, exclusive concept. This being the factual case, a serviceman's First Amendment rights are fully protected, when orders are enforced by trial by court-martial.

Third, when military directives are sought to be enforced by means other than a court-martial, there is the distinct possibility that those other means-dismissal of officers by the President, and transfers, "harassment," unpalatable duty assignments of both officers and enlisted personnel--are simply beyond the reach of the First Amendment, except in extreme cases. Only if the situation were one where the action was done intentionally, solely, and with the proven specific intent to suppress First Amendment rights would the courts be likely to intervene. But to this point in time, no case has ever been presented which has convinced the civilian courts that the military's action was of such magnitude.

If this third conclusion appears unpalatable, it must be remembered that it has only been since 1953, when <u>Burns v. Wilson</u> was decided, that there has been any legal authority at all

even to say that the Bill of Rights applied to servicemen. Even now, no one would say that the Bill of Rights applies to servicemen the same as it applies to civilians. Indeed, as has been outlined previously, the view is that the Bill of Rights applies "differently." In addition, it must also be remembered that the essential legal task of the law of the First Amendment is to balance the competing interests -- that First Amendment freedoms are not absolutes. Thus a serviceman's First Amendment rights are some non-absolute rights applied to him differently than to civilians. And to all this must be added the critical point that the President and his military subordinates have certain powers granted to them by the same Constitution that contains the First Amendment. The President's power in this regard is just as important as the First Amendment. They are both constitutional concepts. Although there are some who argue that the First Amendment is always to be "preferred" over anything else, 249 that is simply one point of view. The more appropriate view, which is consistent with the general law of the First Amendment itself as that law has evolved, is that the two provisions of the Constitution must be balanced. Clearly the President is not bound by the First Amendment on its own terms. Thus if certain actions taken by him or his military subordinates infringe on First Amendment rights, but are taken not for the

<sup>249&</sup>lt;sub>See supra</sub>, n. 217.

valid military purpose, the courts simply say that the First Amendment does not apply. In the balance, the command necessity which the President and his military subordinates use as the basis for their actions outweighs the First Amendment rights of the individual serviceman involved. After all, no one has ever said that the military is a democratic institution, or that it ever could be operated as one.

On the other hand, as the Second Circuit opined in Cortright v. Resor, if a case did present itself where it appeared that the military was taking action solely and intentionally to curtail First Amendment rights, the civilian courts would have the right to invalidate that military directive. The court did not articulate its legal theory. But it appears safe to predict that, should such a case arise, the civilian courts would find a legal theory to invalidate the military decision on constitutional grounds. The only requirement is that the case must be exceptionally clear on its facts—and in most cases, such factual clarity is simply not sufficiently present to outweigh the military decision involved.

Thus the area of the enforcement of military directives by means other than a court-martial is an area where the First Amendment applies "differently" of necessity for military personnel. This concept will be discussed in some more detail in Part V, infra.

### D. Discipline

Throughout the discussion which will follow, military discipline will be cited again and again as perhaps the major reason why the First Amendment does not apply the same to servicemen as it does to civilians. Thus some understanding of this concept is mandatory.

The Army's definition of discipline is as clear as any:

- a. Military discipline is a state of individual and group training that creates a mental attitude resulting in correct conduct and automatic obedience to military law under all conditions. It is founded upon respect for and loyalty to properly constituted authority.
- b. While military discipline is enhanced by military training, every feature of military life has its affect on military discipline. It generally is indicated in an individual or unit by smartness of appearance and action; by cleanliness and neatness of dress, equipment, and quarters; by respect for seniors; and by the prompt and cheerful execution by subordinates of both the letter and the spirit of the legal orders of their lawful superiors. 250

The most telling feature of this definition is its all-pervasive character, its comprehensiveness. It embraces "every feature of military life." Thus it should come as no surprise that in the discussion which follows it will be invoked so often as the justification for various restraints on a serviceman's First Amendment freedoms.

The premise that military discipline justifies certain restrictions on a serviceman's freedoms has been challenged on

<sup>250</sup>AR 600-20, 28 Apr. 1971, para. 5-1.

three levels in an article entitled "Military Discipline and Political Expression: A New Look at an Old Bugbear" published in the May 1971 issue of the <u>Harvard Civil Rights-Civil Liberties Law Review</u>. 251 Because of the importance of the concept of military discipline in the discussion which follows, and because of the scope of the article's attack--not to mention its invalidity--the article deserves analysis.

The article challenges first the definition of military discipline quoted above. The author quotes another definition of discipline contained in an Army leadership manual, which includes an additional phrase requiring servicemen to initiate appropriate action in the absence of orders." 252 The relevance of such a requirement in a leadership manual is obvious. However, the author takes this from its context and comes to the conclusion that it knocks the props out from under the definition of leadership quoted above. The author cites several sociological studies to argue that if the military is shifting from an autocratic concept of operations to a "managerial" concept of operations, certain initiative on the part of servicemen is required at all times. 253 He then argues that that required initiative cannot ensue without full and free dis-

<sup>251</sup> Johnson, Military Discipline and Political Expression: A New Look at an Old Bugbear, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 525 (1971).

<sup>252</sup> Id. at 534.

<sup>253</sup> see, e.g., M. Janowitz, The Professional Soldier (1960).

"An Army is not a deliberative body" 254 is now dead. He concludes that the quoted definition of military discipline can "no longer be used legitimately to limit free expression." 255

This argument misses the point on a number of scores. First, the full and free discussion which may be involved in the decision-making process involved in the "new" military does not involve everybody. The military is still not a "deliberative" or "democratic" institution. True, a certain commander may request the views of his superiors, contemporaries, or subordinates in reaching a certain decision. But he does not have to make such a request. Nor does he have to consult or get any approval from the "troops"; indeed, that is simply too "democratic" for the military. Second, once a decision is made, military discipline requires "correct conduct and automatic obedience . . . under all conditions." Even if the situation is one where personal initiative is required, that initiative cannot operate contrary to previously-decided standards. Particularly is it true that military discipline requires complete obedience to orders when the individual disagrees with the decisions made by his superiors, or the pre-existing policies which impose limits on the exercise of his initiative. Finally,

<sup>2546</sup> Harv. Civ. Rights-Civ. Lib. L. Rev. at 537.

<sup>255</sup> See M.C.M., para. 171 W. Winthrop, Military Law and Precedents, Ch. II (2d ed., 1920 reprint).

military training manuals do not have the "force and effect of law" as do military regulations. Thus the controlling definition is that one quoted above, not that contained in the leadership manual which the author cites. Further a general definition of military discipline and a definition particularly suited to training in military leadership are quite sensibly different. Thus the particular definition should not be considered to knock the props out from under the general definition—especially when, as in this case, there is not really any logical inconsistency between the two.

The second challenge which the article raises is the argument that the Supreme Court's decision in O'Callahan v.

Parker 256 rejected the argument that military discipline can form the basis for restricting servicemen's First Amendment freedoms. The argument is apparently based on the point that the Government contended in its brief that an offense should be considered "service connected" if it violated that portion of Article 134 of the Uniform Code of Military Justice which proscribes conduct which "discredits" the armed forces, and the fact that the Court rejected that argument. 257 From this fact the author jumps to the conclusion that, because the Court

<sup>256395</sup> U.S. 258 (1969).

<sup>257&</sup>lt;u>Id.</u>; Brief for the United States at 27-28; <u>cf.</u> 395 U.S. at 281-284 (dissent).

rejected one portion of the Article 134 argument, it rejected the total applicability of Article 134--which also proscribes conduct "to the prejudice of good order and discipline in the armed forces." This leap is clearly erroneous. In O'Callahan itself it is clear that perhaps the most firm service-connected conduct is that which affects military discipline. Relford v. Commandant, United States Disciplinary Barracks, which purports to "explain" O'Callahan's service-connected formula, is also clear beyond question that military discipline is one of the most important factors to be considered in determining whether an offense is service-connected. If anything, then, both O'Callahan and Relford confirm that military discipline may indeed form the basis for differing constitutional treatment of servicemen. It also is perhaps worth noting that this idea is no change in the Supreme Court's views; when it decided Burns v. Wilson<sup>259</sup> in 1953 and said (as clearly as it ever has) that the Bill of Rights applies to servicemen, it also said that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."260

Finally, the article challenges the military's view

<sup>258401</sup> U.S. 355 (1971).

<sup>&</sup>lt;sup>259</sup>346 U.S. 137 (1953).

<sup>260</sup> Id. at 140.

that certain conduct which for civilians would be protected by the First Amendment should be restricted in the military because it adversely affects military discipline. The article does not go so far as to contend that servicemen should be allowed to call their superiors by vulgar names. But it does conclude that

Free speech would not hinder military effectiveness. Soldiers' political beliefs have been found to
be of minimal consequence to military performance.
Intra-group pressures affect performance far more
than personal ideological beliefs do. Nor are individual soldiers likely to persuade other servicemen to adopt their beliefs.

These conclusions are based on a number of sociological studies cited in the article. However, in the Cortright v.

Resor<sup>262</sup> case which was mentioned earlier, there was clear evidence that the political discussions concerning the Vietnam war which took place in the unit actually caused such a complete polarization of the men that the unit could no longer operate effectively. Further, while soldiers may well not be successful in persuading other soldiers to believe as they do, they may well be quite successful in persuading them to act in a manner inimical to good military discipline.<sup>263</sup> Indeed, the

<sup>2616</sup> Harv. Civ. Rights-Civ. Lib. L. Rev. at 543-544.

<sup>262</sup> See supra, n. 243.

<sup>263</sup> see supra, n. 190.

article itself notes that sociological studies indicate that intra-group pressures are much more likely to affect group performance; thus what if the group pressure involved was to refuse to accept military orders to go to Vietnam because of a political disagreement with United States foreign policy? Finally, the major thrust of the studies cited in the article relate to expressions of belief. The military permits such expressions, the same as does the civilian community; what the military restricts is the communication of those beliefs which, if adopted and acted upon, would be destructive of military discipline. 264 The restrictions will be examined in detail in Part IV of this paper; but, again, an example would be urging others to refuse to accept military orders for Vietnam, based on a political disagreement with United States foreign policy. Thus the article's third challenge simply assumes that sociological studies relating to belief -- which no one attempts to limit--equate to military restrictions on conduct imposed in the name of military discipline. The assumption and thus the article's conclusions are unwarranted.

This is not to say, of course, that the mere invocation of military discipline will justify every restriction which the military seeks to impose; as the following discussion will demonstrate, there are other considerations as well which also form the basis for limiting First Amendment freedoms. And, as

<sup>264</sup> see supra, n. 191.

the discussion also will show, not every claim of discipline as the basis for limiting a serviceman's expression is valid; article 88 of the Uniform Code is a notable example. But without question, military discipline is the <u>major</u> reason why a serviceman's First Amendment rights apply "differently" than do those of his civilian brothers. The definition quoted above, and especially its broad scope, should be kept in mind as the discussion proceeds.

We shall now turn our attention to a specific examination of a serviceman's rights to freedom of religion and to freedom of expression, in that order.

#### PART III

### A SERVICEMAN'S FREEDOM OF RELIGION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

### -- The First Amendment

As everyone knows, the military is an autocratic institution where one's time is not his cwn. The quotation from Raderman v. Kaine<sup>265</sup> introducing this paper was placed at the very beginning to stress the constitutional issue:

Do certain aspects of the military modus operandi violate the First Amendment?

For example, the military services all have commissioned officers called "chaplains," all of whom are ordained ministers, priests, or rabbis, and all of whom act in their religious capacity within the military. Their salaries are paid from congressionally-appropriated funds, just as any other officer's salary. Military installations all have structures used specifically as churches—called "chapels" in military terminology. These, too, are built with Federal funds. Indeed, the Articles of War of 1775, 266 1776, 267 1806, 268 and 1874 269—

<sup>265411</sup> F.2d 1102, 1104 (2d Cir. 1969).

<sup>266</sup> Articles of War of 1775, Art. II; reprinted in

<sup>267</sup> Articles of War of 1776, § I, Art. 2; reprinted in

<sup>268</sup> Articles of War of 1806, Art. 2; reprinted in

<sup>269</sup> Articles of War of 1875, Art. 52; reprinted in

with only minor differences in punctuation over the years—all read "It is earnestly recommended to all officers and soldiers, diligently to attend divine service . . . " A similar provision still exists in the United States Code relative only to the Navy. 270 Does all this constitute an unlawful "establishment" of religion in violation of the First Amendment?

In relation to a serviceman's religious beliefs, how does the military's life-style affect him? If a serviceman has certain religious beliefs, to what extent can he pattern his life within the military to conform to those beliefs? What does he do when his beliefs conflict with a military rule? While Sunday is usually a non-duty day, can a Christian soldier be made to perform military duties anyway?

These questions form the basis of the discussion in this section of the paper.

# A. Establishment of Religion

The most obvious example of what might possibly be an unconstitutional establishment of religion in the military is

W. Winthrop, 2 Military Law and Precedents 68 (1886 ed.).

W. Winthrop, 2 Military Law and Precedents 79 (1886 ed.).

W. Winthrop, 2 Military Law and Precedents 98 (1886 ed.).

W. Winthrop, 2 Military Law and Precedents 117 (1886 ed.).

<sup>270</sup> See infra, n. 275.

the existence of the chaplaincy. An offshoot of this is the requirement for mandatory (with some exceptions) attendance at chapel at the three service academies. Finally, are there any other specific activities conducted by the military which might tend to establish religion unconstitutionally?

Before turning to these questions, a clarification of the phrase "establishment of religion" is in order. If Congress were to enact legislation declaring a particular religious sect to be the religion of the United States, and if the activities of that religious sect were totally financed with public funds, there would be no question that Congress had "established" a church. However, as noted by the Supreme Court, 271 the language of the First Amendment does not merely prohibit the establishment of a church; it prohibits the establishment of religion. This far broader word clearly encompasses the concept of a church. It also obviously goes much further. Although there are many passages from various opinions of different Justices in Supreme Court decisions which could be used to give an indication of the scope of the establishment clause, perhaps the most comprehensive is that stated at two different places in the concurring opinion of Justice Brennan in School District of Abington Township, Pennsylvania v. Schempp. 272

<sup>271</sup> Everson v. Board of Education, 330 U.S. 1, 15, 31-33 (1947).

<sup>272&</sup>lt;sub>374</sub> U.S. 203 (1963).

There, Justice Brennan says that the establishment clause forbids the

involvement of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. 273

Thus the clause means far more than merely establishing a state-supported church. And in keeping with that broad meaning, the Court has struck down various arrangements, mostly involving the public schools, where the government has become involved with religious affairs. 274 Under this posture of the law, how does the military fare?

## 1. The Military Chaplaincy

The military chaplaincy is unequivocally authorized by specific congressional legislation. <sup>275</sup> Thus it falls squarely

<sup>273</sup> Id. at 231, 295.

<sup>274</sup> Specific examples will be discussed infra, p. 158 ff.

<sup>275</sup>For the Army:
10 U.S.C. § 3547 (1970): "Duties: Chaplains, assistance required of commanding officers.

<sup>&</sup>quot;(a) Each chaplain shall, when practicable, hold appropriate religious services at least once each Sunday for the command to which he is assigned . . . .

<sup>&</sup>quot;(b) Each commanding officer shall furnish facilities, including necessary transportation, to any chaplain assigned to his command, to assist the chaplain in performing his duties."

within the ambit of the First Amendment.

In 1928, a taxpayer took a case to the United States Court of Appeals for the District of Columbia Circuit, 276 seeking to have the military chaplaincy ruled unconstitutional. However, due to the Supreme Court's decision some five years earlier in the case of Frothingham v. Mellon, 277 the court ruled that the taxpayer had no standing to sue. Thus the actual merits of the claim were never decided. And, since the Supreme Court reversed Frothingham in the 1968 case of Flast v. Cohen, 278 no taxpayer has thus far sued, challenging the constitutionality of the military chaplaincy. Accordingly, there is no decision directly on point.

However, in a number of those cases dealing directly with the establishment clause and the public schools, as well

<sup>&</sup>quot;(b) The commanders of vessels and naval activities to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend every performance of the worship of Almighty God.

"(c) All persons in the Navy and in the Marine Corps are enjoined to behave themselves in a reverent and becoming manner during divine service.

For the Air Force:
10 U.S.C. § 8547 (1970):
This section is a verbatim repeat of 10 U.S.C.
§ 3547 for the Army, above.

<sup>276</sup> Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928).

<sup>277&</sup>lt;sub>262</sub> U.S. 447 (1923).

<sup>278&</sup>lt;sub>392</sub> U.S. 83 (1968).

as in other cases dealing with the clause in other contexts, the Supreme Court has clearly had in mind the military chaplaincy problem, as well as other examples of the involvement of church and state which are extant in American life. 279

The first case to come before the Supreme Court where the establishment clause was directly considered was Everson v. Board of Education<sup>280</sup> in the surprisingly late year of 1947. <sup>281</sup> The issue in that case was whether a New Jersey plan which gave a cash payment to parents as reimbursement of school bus transportation was lawful when the child attended a parochial school as opposed to a public school. Although taking his absolutist approach to the wording of the First Amendment, Justice Black speaking for the majority held that the particular arrangement did not violate the required separation of church and state. No mention of the military chaplaincy was made by anyone anywhere in the decision.

<sup>279</sup> One of the most frequently-mentioned involvements is the existence of a chaplain in both Houses of Congress. The traditional opening intonation at the Supreme Court itself has been mentioned. The existence of the slogan "In God We Trust" on American currency, the invocation of divine blessings and assistance by Presidents during their inaugural and other addresses, and other "ceremonial occasions" are also cited.

<sup>&</sup>lt;sup>280</sup>330 U.S. 1 (1947).

<sup>281</sup> Although earlier cases may have touched on the issue of the establishment clause, all agree that <u>Everson</u> was the first case to deal directly with the issue. <u>Accord</u>, Justice Brennan (concurring), School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 246 (1963).

The second major case to reach the Court was Illinois ex rel. McCollum v. Board of Education 282 in 1948. The program which McCollum struck down was an Illinois plan whereby students in the public schools, whose parents so elected, would be permitted to attend religious instruction in the school. Further, the instructors for these periods were recognized denominational clergymen who were brought in from outside the normal school faculties. Children who chose to attend could attend the class taught by the clergyman representing the religious views of their choice. The Court, again speaking through Justice Black, held this use of public school facilities and time "established" religion. The opinion of the Court did not mention the military chaplaincy.

However, Justice Reed dissented in McCollum. In essence, he rejected the absolutist approach. After pointing to the long traditions where there was an "accommodation" between church and state interests in America, Justice Reed concluded that

The prohibitions of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment--free speech, free press--are absolutes.<sup>283</sup>

Significantly, Justice Reed cited the military chaplaincy in general and the mandatory chapel requirements at the service

<sup>&</sup>lt;sup>282</sup>333 U.S. 203 (1948).

<sup>283</sup> Id. at 255-256.

academies particularly as areas where there has been a traditional and accepted accommodation between church and state. 284

lishment clause was Zorach v. Clauson. 285 There the Court upheld a New York plan whereby school children were released from school early in order to attend religious instruction conducted by their various religious sects at places supplied by the religious sect itself. While the case again nowhere mentions the military chaplaincy, the decision itself represents an accommodation between religious and state-sponsored education and, to that extent, is certainly not inconsistent with the existence of the military chaplaincy.

Next came a line of cases which considered whether various forms of the Sunday closing laws (the <u>Blue Law Cases</u>) 286 constituted an unlawful establishment of religion. These cases obviously had nothing to do with the public schools. But they did establish three relevant points. First, by upholding the Sunday closing laws, the Court again effected an accommodation between church and state interests. Second, the majority view was that the Sunday closing laws, while

<sup>284</sup> Id. at 254.

<sup>&</sup>lt;sup>285</sup>343 U.S. 306 (1952).

<sup>286</sup> McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961).

perhaps religiously initiated, had so changed to secular goals concerning a day of "rest" and other humanitarian considerations, that they no longer really represented an unconstitutional religious involvement of church and state. Finally, in a concurring opinion to one of the cases, Justices Frankfurter and Harlan developed a "balancing" test for establishment cases. They held that where the "primary end" of the church-state involvement was religious, the arrangement would violate the establishment clause; but where in the balance the "primary end" was determined to be some other, lawful object, the establishment clause would not be violated.

The Court returned to the public school arena in the case of Engel v. Vitale<sup>287</sup> in 1962. Engel centered on the lawfulness of a non-denominational prayer written by the New York State Board of Regents, which prayer was required to be said at the opening of each school day. School children were permitted to be excused if they wished, and in any event were not required to "participate" in the praying even if they did not choose to be excused altogether. The Court held that even with the provisions for excusal and voluntary participation, the mere act of praying in the public schools violated the establishment clause. Specifically, the Court said that

<sup>287370</sup> U.S. 421 (1962).

The Establishment Clause . . . does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonbelieving individuals or not. 288

In reaching this decision, various Justices alluded to the military chaplaincy. The majority opinion said, in a footnote, that

There is of course nothing in the decision reached here that is inconsistent . . . with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance. 289

In his concurring opinion, however, Justice Douglas appeared to be firmly against such "manifestations," whether involving the military or otherwise. In a footnote, he quoted from a book entitled The Limits of Freedom thusly:

Concerning his opinion of the legality of such "aids," Justice Douglas said:

Our system at the federal and state levels is presently honeycombed with [governmental] financing [of

<sup>288</sup> Id. at 430.

<sup>289</sup> Id. at 435 n.21.

<sup>290</sup> Id. at 437 n.1.

religious services]. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes. 291

Further, Justice Douglas specifically noted in another footnote<sup>292</sup> that, in contrast to the New York prayer plan where attendance was voluntary, attendance at chapel services at the service academies is compulsory.

Finally, in his dissent in <a href="Engel">Engel</a>, Justice Stewart noted that military chaplains are paid with federal funds. 293

In the next year, 1963, the Court decided the important case of School District of Abinqton Township, Pennsylvania v. Schempp. 294 The issue in Schempp was the constitutionality of a Pennsylvania statute requiring a Bible reading to open each school day. The Court struck down the statute as establishing religion.

After all the comments in <u>Engel</u> concerning the military chaplaincy, it is not surprising that many comments were made in <u>Schempp</u> as well. It is interesting that Justice Douglas was the only Justice who wrote an opinion which did not directly mention the military situation. Had he done so, however, he probably would have been against the practice. Not only is this clear from his views in <u>Engel</u>, as set out above, but in

<sup>291</sup> Id. at 437.

<sup>292</sup> Id. at 438 n.2.

<sup>293</sup> Id. at 449 n.4.

<sup>294374</sup> U.S. 203 (1963).

Schempp itself he wrote the following in his concurring opinion:

But the Establishment Clause . . . also forbids the State to employ its facilities or funds in any way that gives a church, or all churches, greater strength in our society than it would have by relying on its members alone.

Justice Clark, speaking for the Court, seemed specifically to recognize the validity of the military chaplaincy:

[T]here are such manifestations [of governmental involvement in religious activity] in our military forces, where those of our citizens who are under the sanctions of military service wish to engage in voluntary worship. 296

Further, in a footnote, the majority said:

We are not of course presented with and therefore do not pass upon a situation such as military service, where government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with use of government facilities, military personnel would be unable to engage in the practice of their religion.<sup>297</sup>

Also, Justice Goldberg in a concurring opinion went even further:

And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains. 298

<sup>&</sup>lt;sup>295</sup><u>Id</u>. at 229 (emphasis in original).

<sup>&</sup>lt;sup>296</sup><u>Id</u>. at 213.

<sup>297</sup> Id. at 226 n.10.

<sup>298</sup> Id. at 306.

However, it was Justice Brennan in his concurring opinion who propounded the most meaningful argument in this area. Clearly being aware of the many areas of American life where there is some involvement of church and state, Justice Brennan wrote that he believed some accommodation between church and state must be reached. Critical to his approach was his view that the school cases should be considered "unique" and therefore not dispositive of the issues involved in other areas. 299 Rather, he evolved his three-point test, cited earlier, to test any situation for an unconstitutional relationship between church and state.

Further, Justice Brennan specifically discussed the military chaplaincy problem at some length. To him, the issue was one that involved a conflict between the establishment and free exercises clauses of the First Amendment itself. In his view, the right of servicemen to exercise their religion free-ly outweighed any possible "establishment" which might simultaneously occur as a result of providing them with the means whereby they may exercise their religion, should they wish to do so. Therefore, because the

government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing upon free exercise, provide substitutes where it requires such persons to be. 300

<sup>299</sup> Id. at 294.

<sup>300</sup> Id. at 297-298.

Justice Brennan also pointed out that, contrary to the school cases, the military case involves relatively mature adults, not impressionable school children. Additionally, he noted that mandatory attendance at a public school would not deprive the school children of their opportunities to exercise their religious preferences in whatever way they wanted to, since the school situation was not "total." In contrast, the military situation does represent a total environment which might deprive the individual serviceman of his opportunity freely to exercise his religious preferences. Finally, Justice Brennan concluded with a distinction between hostility and neutrality, saying that to refuse to provide the military services with chaplains would be hostile to religion in the military, and not merely neutral towards it. The government must be neutral towards religion. 301

While all the foregoing comments concerning the military chaplaincy are dicta in the cases concerned, it is hard to say that the Court has not "decided" the issue. Justice Goldberg's comment in Schempp is worth repeating:

And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains. 302

precedents for Justice Brennan's formulation of his three-point test, and indeed for an excellent critical analysis of the constitutionality of the military chaplaincy in general, see Figinski, Military Chaplains--A Constitutionally Permissible Accommodation Between Church and State, 24 Md. L. Rev. 377 (1964).

<sup>302370</sup> U.S. at 306.

Mention should be made of the latest establishment case to come before the Supreme Court, Walz v. Tax Commissioner. 303 In that 1970 case, the issue was whether a New York State tax exemption for property owned by religious institutions was constitutional. Petitioner claimed that the exemption amounted to direct support of religion and therefore violated the establishment clause. The Court, speaking through the Chief Justice, held that neutrality with an indirect benefit to religion did not equal establishment. He again cited the long historical tradition behind the tax exemption. Justice Brennan again wrote a concurring opinion based on his three-point analytical scheme propounded in Schempp. Justice Douglas dissented. Thus, in sum, Walz actually changed nothing of the law as it had developed up to and through Schempp--at least insofar as the constitutionality of the military chaplaincy is concerned.

What, then, would be a fair general statement of the law through <u>Schempp</u> concerning the establishment clause? First, even though Justice Black wrote the initial opinions of the Court in absolutist terms, it is clear that the majority of the members of the Court now firmly reject that notion. Rather it appears that the majority now holds that the establishment clause is no more an absolute than any other portion of

<sup>303397</sup> U.S. 664 (1970).

the First Amendment. This only confirms what has been said earlier in this paper -- that while freedom of belief may be an absolute, no other concept included within the First Amendment can, in the nature of things, be absolute. Second, what is the standard whereby some balance will be struck in a churchstate problem? The key words threading their way through the cases seem to be primarily "accommodation" and to a lesser extent, "neutrality"; but these words give little basis for determining how the balance is to be struck. They really seem to mean no more than to say that a balance <u>must be</u> struck, but nothing about how. Thus it appears that one is left with Justices Frankfurter's and Harlan's "primary end" test, set out in the Blue Law Cases and seemingly adopted by the majority in both Schempp and Walz, and with Justice Brennan's threepoint test set out in his concurring opinions in Schempp and Walz.

Before considering the military chaplaincy's constitutional validity by these standards, mention must be made of the fact that military chaplains have a definite non-clerical function in the military. Chaplains have a continuing counselling function, much the same as a civilian minister does. And to the extent that the proper performance of that counselling function improves the welfare and morale of the command, it simultaneously improves the total posture of the command. Any action that improves the esprit de corps of the command.

mand is a <u>military</u> function, regardless of whether in civilian life it might be a religious one. Chaplains also have a role in processing in-service conscientious objector applications; in addition, the senior chaplain in the command is actually considered a member of the commander's staff, with the primary responsibility of coordinating all religious activities throughout the command, as well as advising the commander himself and other members of the staff on matters pertaining to the morale and welfare of the members of the command. In the Army and Air Force, he is also responsible for the command "character guidance" program (of which more will be said later). Thus the military chaplaincy is an integral part of the military command, and not simply and only a purely clerical group extant within the military for the performance of purely religious exercises.

Based on all the foregoing, could one agree with Justice Goldberg that the Court would probably recognize the lawfulness of the military chaplaincy, if actually adjudicating the issue?

In the first place, notwithstanding Justice Brennan's conclusion that the school cases involving establishment of religion should be considered "unique," there are several threads running through those school cases which are rele-

<sup>304</sup>AR 165-15, 18 May 1966, para. 2, 4, and 5.

<sup>305</sup>AR 600-30, 19 Oct. 1971; AFR 30-51, 24 Oct. 1969.

vant. There is the concept of tradition; the military chaplaincy pre-dates the Constitution itself. Congress has also continued to provide for the military chaplaincy, as Justice Douglas noted, from the very year it adopted the First Amendment to the present. 306 Second, actual attendance at religious services conducted by a military chaplain is voluntary. 307 The military merely makes available, as it were, the opportunity to exercise one's religion; it does not make attendance mandatory (except at the service academies). Finally, servicemen are clearly more mature than school children.

Next, turning to Justice Brennan's three-point test, what result would accrue from applying it?

Justice Brennan's first test is whether the churchstate involvements "serve the essentially religious activities of religious institutions." The answer to that question
is that that is precisely one of the functions of the milichaple incy--although it does accomplish some non-religious
functions in its staff responsibilities. The second test is
whether the church-state involvements "employ the organs of
government for essentially religious purposes." Since all

<sup>306</sup>president's Committee on Religion and Welfare in the Armed Forces, The Military Chaplaincy 5 (1950).

<sup>307</sup>AR 165-20, 18 May 1966, as changed by Change No. 3, 1 Aug. 1968, para. 10d(2). There are no specific comparable provisions in either Air Force or Navy regulations, although the principle is factually true in both services.

military chaplains are commissioned officers of the United States military establishment, and their salaries and actual religious ministry are supported by the appropriation of public funds, at least insofar as their clerical functions are concerned, the second test appears to be met as well. Finally must be considered Justice Brennan's third test, which is whether the church-state involvements "use essentially religious means to serve governmental ends, where secular means would suffice." The considerations involved in this last test are more complicated.

The author of a 1964 Maryland Law Review article has asserted that while the governmental end of welfare and morale in the military might be accomplished by secular counsellors, and by secular staff officers, military chaplains make one valuable contribution to the military which secular persons could not. That contribution is that the mere presence of the military chaplain, in uniform, and as a member of the military staff, serves to remind the highest officer through the lowest-ranking noncommissioned officer that there is a higher order than the power inherent in the position of command which the military individual occupies. This reminder serves to counteract any tendency which the individual might have to become over-militaristic, and it even might serve to remind him that his military authority is always subject ultimately to higher civilian control, under the American constitutional scheme. 308

<sup>308</sup> Figinski, <u>supra</u>, n. 32 at 408, <u>citing</u> President's Committee on Religion and Welfare in the Armed Forces, The Military Chaplaincy 2 (1950).

Additionally, the same author has asserted that there are really no secular means which will suffice as alternatives to the purely religious aspects of the military chaplaincy. 309 One could suggest that servicemen be given free time to worship in the civilian community as they choose, rather than having worship facilities and clergy provided by the military. However, free time to allow the serviceman to go whatever distance might be required might cause too much loss of military control over the serviceman, too frequently. Providing chapel services on the installation where the serviceman is stationed allows the military to retain control over him much more effectively. 310 Second, overseas particularly and even in parts of the United States itself, it might be either difficult or impossible to find a civilian church representing a particular serviceman's particular belief. Overseas the language barrier might prove insurmountable. Thus, merely allowing the serviceman free time might not be a real substitute for providing a broad range of religious services on the installation itself. Finally, if the military installation were located nearby only to a small civilian community (and that seems frequently to be the actual case), the requirement that those civilian communities' churches minister to the military com-

<sup>309</sup> Figinski, supra, n. 32 at 409. The following two maragraphs of the text are adapted from the cited article 409 ff.

<sup>110</sup> See AR 165-20, 18 May 1966, as changed by Change Aug. 1968, para. 8.

munity as well might so overburden the civilian churches that they could not perform adequately. They also might become resentful of the intrusion by the military. And any such resentment which might evolve would be particularly detrimental to the United States itself, since it is always desirable that there be good relations with the local civilian community near a Federal military installation. Providing adequate religious services and facilities on the military installation itself avoids this possibility.

One other suggested alternative is to require the various religious sects to provide their own clergy to minister to the military, much as the American Red Cross provides its own personnel and transportation facilities, both in the United States and overseas. Although the military would probably be required to furnish some assistance in the form of places to worship, telephone communications, and the like, particularly overseas, given the nature of the military situation this would most likely be no more "establishment" of religion than providing police and fire protection to a church in a civilian community. However, this is not a satisfactory alternative, either. In the first place, some minority or impecunious religious sects might not be able to furnish ministers out of their own funds on a world-wide basis. This would therefore effectively deprive servicemen of that particular sect from having a religious ministry, simply because they are

servicemen. Except in a few cases of the larger sects, the availability of a minister might be vastly less than what it is under the military chaplaincy program. Finally, the military itself would have no real control over the clergyman thus provided, and particularly the military would not be legally entitled to avail itself of the very real contribution to morale and welfare which the military chaplain makes in his role as a staff officer.

Thus an analysis of Justice Brennan's tests indicates that at least two of them support an argument that the military chaplaincy constitutes an unlawful establishment of religion. However, a thorough consideration of the third test indicates that there are indeed no reasonable alternatives to the military chaplaincy and, if the program were abolished, servicemen would be effectively deprived of the right to the free exercise of whatever religious beliefs they hold. Justice Brennan himself, in Schempp, where he propounded the three tests, had no difficulty in excluding the military chaplaincy from them, because of the conflict between the establishment and the free exercise clauses of the amendment.

The same considerations lead to the same conclusions under Justices Frankfurter's and Harlan's "primary end" balancing test, propounded in their concurring opinion in McGowan v. Maryland (one of the Blue Law Cases). The "primary end"

<sup>311&</sup>lt;sub>366</sub> U.S. 420 (1961).

of the military chaplaincy is to insure the free exercise of religion by servicemen. This is a valid function of government, and it is necessitated by the facts of military life.

Thus it outweighs any infringement on the establishment clause.

Thus it seems fair to conclude that, despite an <u>apparent</u> unconstitutional establishment of religion being effected by the military chaplaincy concept, the Supreme Court would indeed rule, as Justice Goldberg predicted, that the concept was a constitutionally permissible accommodation between church and state interests.

Further, if the concept of the military chaplaincy as such is probably constitutional, it would follow that the expenditure of Federal funds for the construction of chapels as places of worship on military installations would also be lawful. Certainly an important element of the free exercise of one's religion is an appropriate physical place where the religious ceremonies involved may be conducted. Additionally, the use of other military personnel as "chaplain's assistants," the use of military vehicles to assist the chaplains in the performance of their clerical duties, and other such direct and indirect expenditures of funds and uses of personnel and material, would for the same reason be lawful.

# 2. Compulsory Chapel at the Service Academies

It might appear that if the military chaplaincy in general is constitutional, the mandatory chapel attendance re-

quirement at the service academies is likewise constitutional. However, there are two significant differences which overcome this first impression. First, a serviceman's actually availing himself of a military chaplain's ministry is strictly voluntary. 312 In contrast, attending chapel at the service academies is generally compulsory, 313 with the single exception that a cadet or midshipman can be excused "where attendance would be in conflict with sincerely held convictions." 314 However, since the service academies, as will be pointed out in more detail shortly, consider chapel attendance not a religious exercise but a secular training session, a cadet's or midshipman's "convictions" would most likely have to be extremely unique to justify his avoiding this "training." Thus excusals would probably be few. Second, whereas in the military service as such, an attempt is made to provide for the religious views of all, even to the point of hiring nonmilitary clergy to come on post to conduct particular services, 315 chapel at West Point is limited

<sup>312</sup> see supra, n. 307.

<sup>313</sup> Regulations for the United States Cadet Corps of the United States Military Academy, Ch. 8, 8 IV, para. 819; AFR 265-1, 29 Aug. 1968; United States Naval Academy Regs., Part II, Ch. 15.

<sup>314</sup> The Eleventh Conference of Superintendents of the Academies of the Armed Forces, Record of Proceedings 32 (18 Apr. 1969).

<sup>315</sup>AR 165-20, 18 May 1966, as changed by Change No. 3, 1 Aug. 1968, § IV; AFR 265-4, 20 May 1969; Navy Regs. 0711, para. 3(a) and Secretary of the Navy Instruction (SECNA) 1730.3 D.

to a Catholic, Protestant, or Jewish chapel service. A

Buddhist at West Point, therefore, must elect to attend one
of the three or seek excusal; no Buddhist chapel is provided.

(There is some greater degree of leniency in this regard at
Annapolis and the Air Force Academy.) 316

In the 1964 <u>Maryland Law Review</u> article cited earlier, the author applies the conclusions he reaches concerning the military chaplaincy to the service academy chapel program and concludes that the essential involuntariness of the academy program renders it unconstitutional. 317 However, in the 1970 case of <u>Anderson v. Laird</u>, 318 the District Court for the District of Columbia, when faced with a direct challenge to the program, concluded otherwise.

First the court looked at the long history of the practice of compulsory chapel at the service academies. It noted

<sup>316</sup> The West Point scheme is established in Regulations for the United States Cadet Corps of the United States Military Academy, Ch. 8, 8 IV, para. 819. The opinion of the court in Anderson v. Laird, 316 F. Supp. 1081, 1084 (D.D.C. 1970) states that midshipmen at Annapolis are authorized to go to a denominational church of their choice in the civilian community in lieu of attending chapel or church at the Naval Academy itself; Air Force Academy cadets are also permitted to attend denominational services in the civilian community, but only with the approval of the Academy Senior Chaplain. The difference in treatment is also inferred to arise from the Army's assertion that civilian religious facilities in the area surrounding West Point are too few to accommodate the Cadet Corps; this is undoubtedly true.

<sup>317</sup> Figinski, supra n.301 at 414-415.

<sup>318&</sup>lt;sub>316</sub> F. Supp. 1081 (D.D.C. 1970).

Annapolis in 1853, and the Air Force Academy has had the requirement since its founding in 1955. While the court ruled that long practice did not make unconstitutional practices per se constitutional, it clearly gave importance to the long tradition behind the practice. This is of course justified by the use of the same considerations by members of the Supreme Court when they have discussed the military chaplaincy by way of dicta in the school cases, as noted above. 319

Next the court assessed the standards formulated in Schempp and Walz concerning the unconstitutional establishment of religion. It found that the majority opinion in Schempp held that the test to make the determination was the purpose and primary effect of the practice in question. The court found that Walz adopted the same test, although Walz articulated the test as one of "intent."

Applying these tests to the service academy mandatory chapel case, the court reviewed the testimony of the Super-intendent of the United States Naval Academy, the (then) Chief of Naval Operations (now Chairman of the Joint Chiefs of Staff), and the Assistant Secretary of Defense for Manpower and Reserve Affairs. All of these gentlemen in effect testified similarly. First they said that mandatory chapel attendance at the service

<sup>319</sup> See supra p. 169.

academies is not imposed for the purpose of religious worship but for training. Thus worship is not required, although it is of course permitted at the services in question. As to the training, the witnesses said that they felt attendance at chapel services was the best way to teach duty, integrity, and moral responsibility, plus a sensitivity to the spiritual needs of men in times of extreme crisis (such as combat). Further, they thought that chapel would give cadets and midshipmen an understanding of the basis of religious belief and practice of others, and thus equip them for leadership.

The court ruled that it agreed with the testimony as just outlined. Then the court made several conclusions.

First, the court ruled that mere required attendance was legally different from a requirement of worship. 320 To the court, this legal difference made the mandatory nature of the attendance constitutional. However, this ruling is clearly at odds with what <u>Everson</u> says the First Amendment's establishment clause means:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . Neither can force nor influence a person to go to or remain away from church against

<sup>320</sup> Perhaps the King of Syria had imposed a similar requirement that Naaman (a military general, no less) go to the Temple of Rimmon—whether he worshipped Rimmon or not—thus causing Naaman to ask God's pardon for the fact that he would continue to go, even after Elisha had healed him of his.leprosy. See II Kings 5: 17-19.

his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.321

This language, although contained in the very first case wherein the Supreme Court considered the establishment clause, has
not been effectively modified or overruled in any subsequent
case. It is not couched in terms of worship; it is couched in
terms of pure attendance. Yet this is exactly what is required
at the service academies, and non-attendance without a proper
excuse is a punishable offense. To the extent that the court
in Anderson discerned a distinction between worship and attendance at religious exercises, that distinction has no legal
basis which can be pointed to. And, in view of the whole purpose of the establishment clause, it is doubtful that the Supreme Court would ever make such a distinction and thereby overrule the language in Everson as quoted above. To this extent
at least, it appears that the court in Anderson is simply legally incorrect.

Second, the court in <u>Anderson</u> held that since the purpose of the attendance requirement was military training, any other purely religious consequences which might accrue from attendance—and the court admitted that there obviously were some—would be merely incidental to the secular training aspect. Consequently, such mere incidence would not, to the

<sup>321330</sup> U.S. at 15-16.

court, require a finding of constitutional invalidity. This ruling, too, appears to be in direct conflict with a prior decision of the Supreme Court. In <a href="Engel v. Vitale">Engel v. Vitale</a> the opinion of the Court was that a violation of

[t]he Establishment Clause . . . does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonbelieving individuals or not. 322

If a violation of the clause does <u>not</u> depend on any showing of direct compulsory attendance and does <u>not</u> depend on direct "coercion," certainly mandatory attendance at a religious exercise where religious concepts are propagated appears to violate the establishment clause. A mandatory attendance at a gathering which is without doubt a religious exercise is unconstitutional, even if it has only an indirect or incidental religious impact on those forced to attend.

Finally, the court in <u>Anderson</u> ruled that mandatory attendance did not violate the freedom of exercise clause of the First Amendment, since cadets and midshipmen were still free to do whatever they wanted about religious matters, should attending chapel not be sufficient for their personal religious needs.

In addition, the court in <u>Anderson</u> tested mandatory chapel attendance at the service academies by Justice Brennan's

<sup>322&</sup>lt;sub>370</sub> U.S. at 430.

three-point test outlined in Schempp. As to the first test, that any involvement was prohibited which would "serve the essentially religious activities of religious institutions," the court found that the primary effect of the academies' requirements was military training and not religion. Thus the court held that the first test was not met. The second test is that the involvement must not "employ the organs of government for essentially religious purposes." Again, since the essential purpose of mandatory attendance was military training, the court ruled that the second test was not met, either. Finally, the third test is that the government cannot "use essentially religious means to serve governmental ends, where secular means would suffice." Here, echoing Orloff v. Willoughby, the court ruled that "it is the judgment of military experts that secular means would not suffice." 323 The court deferred to that judgment and accordingly found no violation of Justice Brennan's third test, either.

While there is clearly no legal fault in the court's articulation of Justice Brennan's three tests, the court's application of them leaves much to be desired. In the first place, the court placed blind, unfaltering, and certainly uncritical reliance upon the testimony of the officials. These officials, all of extremely high rank in the civilian or military echelons

<sup>323316</sup> F. Supp. at 1092.

that govern the operation of the service academies, would certainly not speak from the point of view of the individual actually attending the religious exercise. They would quite properly speak from the point of view of the goals which the academies sought to achieve—as indeed they did so speak. But nowhere does the court discuss whatever the cadets and midshipmen testified concerning the impact of mandatory chapel on them. From the viewpoint of an actual attendant, does mandatory chapel attendance actually accomplish the goals described by the testimony of the officials? From reading the opinion of the court in Anderson, one can find no statement of the plaintiffs' views in this regard.

particularly is the decision insupportable in relation to Justice Brennan's third test. Even if, from the Government's point of view, the primary purpose of the mandatory attendance requirement is the secular one of military training, the critical question is whether there is indeed no secular device which would serve to accomplish the training in question, other than the use of a weekly mandatory attendance at a clearly religious exercise. Are there no secular ways to teach duty, integrity, and moral responsibility? Perhaps the views of a trained educator in psychology might have been relevant to the decision of that question. Can a sensitivity to the spiritual needs of men in times of extreme crisis be learned only by going to a religious exercise? Common sense says that going to a beautifully-ordered chapel service in full dress cadet uniform, in

the magnificence of Gothic solidity at West Point, or in the ethereal soaring of modernity at Colorado Springs, is certainly not representative of a time of extreme crisis. Thus it is difficult to see how merely attending such a service would teach anyone anything about the spiritual needs of men in times of extreme crisis. Perhaps a morality play of the medieval ilk would do a better job to that end than a West Point chapel service, even if Billy Graham were preaching. And indeed, a purely secular movie or play might accomplish the task even better. Finally, is the only way to gain an understanding of the religious belief and practice of others by going to an admittedly religious exercise? Again, common sense says that going to a church service, particularly to a Protestant, Catholic, or Jewish service with only other Protestants, Catholics, or Jews present, would not necessarily teach one anything about the religious beliefs and practices of "others." At the academies, if a cadet or midshipman desires to change the category of religious service which he attends, even on a one-time basis, he must secure permission from the military authorities and, if he is under the age of 21, his request for a permanent change must be accompanied by parental consent. 324 Certainly a classroom course in comparative religions would do a much better job to the professed

<sup>324</sup> Requirement cited in Anderson v. Laird, 316 F. Supp. 1081, 1084 (D.D.C. 1970).

end. In addition, cadets and midshipmen might learn something about Buddhism, Confucianism, Shintoism, Islam, or some of the other great religions of the world which would not be at all represented in chapel services at the academies.

Student law review commentators have unanimously condemned the <u>Anderson</u> decision. 325 The one comment by a military writer is noncommittal. 326 It is interesting to note, however, that the only portion of the <u>Anderson</u> decision which the military author quotes in his discussion is not a portion of the actual opinion of the court as such but the court's quotation of the testimony of one of the blue-ribbon witnesses which the Government provided to testify in the case!

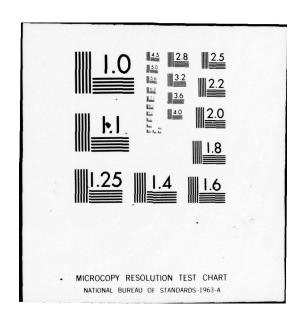
Apparently an appeal was filed to the <u>Anderson</u> decision in August of 1970.<sup>327</sup> It further appears that it has not been withdrawn; yet no report of an appellate decision can be located. From everything that can be gathered, it is simply still "pending." This is regrettable, if only from the point of judicial administration. More important, it would be hoped

<sup>325&</sup>lt;u>See</u> 5 Ga. L. Rev. 400 (1971); 7 Williamette L.J. 365 (1971); 45 N.Y.U. L. Rev. 1286 (1970).

<sup>326</sup> Foreman, Religion, Conscience and Military Discipline, 52 Mil. L. Rev. 77, 89-90 (1971).

<sup>32745</sup> N.Y.U. L. Rev. n. 1 at 1286 (1970) gives docketing number as No. 24,617, and states that the appeal was filed with the United States Court of Appeals for the District of Columbia Circuit on 7 Aug. 1970. The district court decision was rendered on 31 Jul. 1970.

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that a more satisfactory treatment of the legal issues would be forthcoming from the appellate court than was made in the basic Anderson decision itself. Given the generally unsatisfactory nature of the basic Anderson opinion, it is unfortunate that it has been the "law of the case" for as long as it has; further thought and elaboration are required, regardless of the outcome.

Mandatory chapel continues at the service academies.

### 3. The "Character Guidance" Program

Both the Army and the Air Force have programs designed "to promote healthy mental, moral, and social attitudes" 328 in certain servicemen, mainly the younger ones. The Navy has no comparable program. This program used to be called the "character guidance" program in both the Army and the Air Force; recently, the Army has changed the name of its program to the "human self development" program, 329 and the Air Force has changed the name of its program to the "moral leadership" program. 330 As the Army's and the Air Force's programs are so close in scope, no distinction will be made between them in this discussion. Further, as all the former materials, com-

<sup>328</sup>AR 600-30, 19 Oct. 1971, para. 1. The Army's program is covered in this regulation; the Air Force's is in AFR 50-31, 24 Oct. 1969.

<sup>329</sup>AR 600-30, 19 Oct. 1971.

<sup>330&</sup>lt;sub>AFR</sub> 50-31, 24 Oct. 1969.

ments, and references use the former name of these programs, the "character guidance" program, that generic term will be used herein to refer to both programs.

An Army commentator has opined that this program is possibly in violation of the establishment clause of the First Amendment. 334 The validity of this opinion depends on the view one takes of the situation.

The military commentator first assumed that any "train-

<sup>331</sup>AR 600-30, 19 Oct. 1971, para. 6a and b.

<sup>332</sup> Id. para. 1.

<sup>333</sup> Id. para. 5 and 6c.

<sup>334</sup> Foreman, supra, n.326 at 86-89. The remainder of the text on the military "character guidance" program is adapted from the article at the cited pages.

ing" which promotes a given set of moral or ethical values equals promoting "religion." 335 On the other hand, this conclusion certainly was not reached by the court in the Anderson y. Laird decision, where the military experts testified that this was (in part) the purpose of the mandatory chapel attendance requirement at the service academies. Notwithstanding one's disagreement with the Anderson holding in general, the military commentator's point appears to have merit. Further, based on Engel v. Vitale, The Judge Advocate General of the Army concluded essentially the same as the military commentator. 336 As a result, the character guidance program in the Army was reviewed in detail and amended. The upshot of this was to "sanitize" the program of all religious overtones and to attempt to leave it at strictly mental, moral, social, and ethical issuesall in the secular sense. The military commentator concluded that the Supreme Court might uphold the program, as "sanitized." Specifically, he wrote that the program might be justified because of

the need for some substitute for parental and community influences which would ordinarily influence

<sup>335</sup>Based on recent Supreme Court opinions, this conclusion is not necessarily unwarranted. See Welsh v. United States, 398 U.S. 333 (1970), and United States v. Seeger, 380 U.S. 163 (1965).

<sup>336</sup>Op. of The Judge Advocate General of the Army, JAGA 1968/3970 (22 May 1968) (basic opinion); JAGA 1969/4318 (12 Aug. 1969); JAGA 1969/3777 (22 Apr. 1969); JAGA 1968/4684 (6 Nov. 1968). [All such opinions will hereinafter be cited as: "Op. TJAG-(branch of service)" with numerical designation and date following.]

the character development of young soldiers, plus the necessity for creating strong moral and patriotic disposition in soldiers in order to enable them to perform under the terrifying and strenuous conditions of mortal combat. 337

The basic premise of this program--that younger members of the Army and Air Force still require character guidance from a military establishment standing in loco parentis -- is doubtful. The old paternalistic view of the military is waning. Congress now permits young men either to enlist (without parental consent) or to be drafted at the age of 18 or more. Now young men, by a constitutional amendment, can vote at age 18 in Federal elections; further, there appears to be a trend among the States to bring their law into line in this regard. Further, as Morris Janowitz pointed out in his sociological study of the military, The Professional Soldier, 338 the military is shifting from an autocratic, paternalistic concept of operations to a managerial concept. Given the fact of the military's need for discipline and the concomitant requirement for strict obedience to orders, the autocratic aspect of the military can never entirely be eliminated. But the need for discipline does not necessarily have to result in paternalism in the day-to-day operation of the military establishment. It can just as easily be assumed that soldiers and airmen old enough to vote are old enough to be morally responsible for their conduct. It is interesting

<sup>337</sup> Foreman, supra, n.326 at 88.

<sup>338&</sup>lt;sub>M.</sub> Janowitz, The Professional Soldier (1960).

to note that this is the assumption which most colleges and universities make these days—in contrast to a clearly paternal—istic bent strongly in evidence in the past.

Further, one of the justifications for the legality of the military chaplaincy is the relative <u>maturity</u> of servicemen and their consequent ability to choose to avail themselves of a chaplain's services—or not. This is certainly inconsistent with a professed need for a character guidance program; indeed, to make this argument weakens the argument that the chaplaincy is constitutional. Thus it is doubtful that the paternalistic "need" argument for the character guidance program either would be or should be accepted by the Court as a justification for its constitutionality.

However, the Court might accept a strictly military justification that the character guidance program is necessary to create "strong moral and patriotic disposition in soldiers in order to enable them to perform" effectively in battle. Indeed, this argument is clearly evocative of the testimony of all the distinguished witnesses in Anderson v. Laird—and the court there did accept that justification for the academy chapel program—almost too willingly, it might be added. But if this justification is acceptable, it would also appear that some further justification would have to be advanced for making the training mandatory only for enlisted personnel (officers do not receive "basic" training or "advanced individual" training;

only enlisted personnel do), and especially only for (usually) the younger enlisted serviceman. This might be a more difficult task, given the general educational level and maturity of the American public--especially among its younger members-in the 1970's. Perhaps an argument could be made that the training is valid for "first term" enlistees and all inductees, as a means (hopefully) to encourage them to become career servicemen. If this is so, however, the wording of the regulations permitting the training to be given to everyone, after basic and advanced individual training, would have to be changed.

Even assuming that the character guidance program as such were held constitutional, the military commentator sees another potential problem in the fact that chaplains have primary responsibility for planning and conducting the training. Just as some clerics in civilian life are readily discernible by their garb, all military chaplains are equally discernible by their insignia. Thus if the character guidance program is equated to teaching "religion," the fact that it is mandatory and conducted during duty hours by chaplains makes it closely analogous to the situation which the Supreme Court struck down in Illinois ex rel. McCollum v. Board of Education in 1948. Further, the Illinois plan was in essence voluntary, since parents were required to elect to permit their children to attend the religious instruction in the public schools.

requirement.

In contrast, however, at least one State court has held that a minister wearing clearly discernible clerical garb could constitutionally be used by a public school to teach something other than religion. 339 Consequently, if The Judge Advocate General of the Army's attempt to "sanitize" the Army's program of its religiousness has succeeded, and if a valid military purpose for conducting the training can be advanced, the analogy to McCollum becomes weaker. Further, it must be remembered that the military chaplain not only has a purely religious function in the military, but that he also is the principal staff officer in the command on welfare and morale matters. The mere fact that he is clearly a chaplain is immaterial to his staff function and should not be dispositive of the issue, if he is in fact performing his staff function and not a purely religious function. Since he is considered the "expert" on the military staff on matters of welfare and morale, certainly the use of the "expert" to accomplish a valid military purpose within the scope of his expertise should not be unconstitutional. Thus the critical point returns to the question of whether the military could indeed show a valid military purpose for the training, given the limited group on whom the training is imposed.

Despite various complaints against the character guid-

 $<sup>^{339}</sup>$ Moore v. Board of Education, 4 Ohio Misc. 257, 212 N.E.2d 833 (1965).

ance program from individuals in the military and from the American Civil Liberties Union, no direct challenge in a court has ever been raised. The military commentator quoted previously concludes that were such a suit to be brought, "character guidance training as currently utilized in the Army is in serious danger of being overturned by an adverse court decision."340 That remains to be seen, especially if the military can indicate a valid military purpose to be accomplished by the training. If such a purpose can be shown, the disposition of the courts is to follow the precedent of Orloff v. Willoughby and not to interfere in what would be considered the actual operations of the military directed to the accomplishment of a specific military need. Thus while there are clearly First Amendment difficulties involved in the character guidance program, those difficulties do not appear to be of such magnitude that the military could not surmount them and retain its character guidance program -- on a constitutional basis.

4. Mandatory Religious Counselling in Overseas Marriage Cases

Again exhibiting a paternalistic bent, the military generally has a regulatory requirement that any member who wishes to marry overseas secure command permission to marry. 341

<sup>340</sup> Foreman, supra, n.326 at 89.

<sup>341</sup>AR 600-240, 17 Dec. 1965, as changed by Change No. 1, 25 Apr. 1966. The Army's regulation in this instance is typical.

The general justification for this requirement is to insure that the spouse, particularly if an alien, will be permitted into the United States when the serviceman is returned home. Since the military removed the serviceman from the United States and caused him to go overseas, the military should return him home. If he has married while overseas, naturally he would want to bring his wife home with him to the United States. If, however, the spouse were ineligible to enter the United States and the military repatriated the serviceman anyway, it would simultaneously be "breaking up" his marriage -- at least in the physical sense. And it might be permanent, if the serviceman did not have the financial ability to return to his spouse's country, or if that country would not permit him to enter on a permanent basis. Further, the military is justifiably reluctant to discharge servicemen overseas, since doing so makes them aliens in relation to the country in which they are discharged -- and aliens without the protections afforded servicemen under the traditional treaty arrangements which the United States has so carefully negotiated between itself and the host countries where it stations troops overseas. Thus the usual pattern is to return the serviceman to the United States, even if he has married overseas. The logical solution to this dilemma is to insure, so far as possible, that the alien spouse will be able to enter the United States when the serviceman is repatriated.

while that may all be well and good, the regulations in question also require a counselling session between the serviceman, his fiancee, and a chaplain. There is no requirement that the chaplain be of the same religious persuasion as either the serviceman or the fiancee. Could the serviceman constitutionally refuse to secure the mandatory religious counselling and demand that permission to marry be granted without it? Or could he simply comply with all other aspects of the regulations except the religious counselling requirement, and then marry with impunity?

The answer from the Court of Military Appeals is "no."

In the case of <u>United States v. Wheeler</u>, 343 the Court

of Military Appeals considered the conviction of a Navy serviceman for violating a permission-to-marry regulation by marrying without command permission. The court found the regulation in general to be justified essentially as outlined above, in that it found that this reasoning promoted the "health, welfare, and morale" of the command. Concerning the religious counselling requirement, the court said:

As far as religious liberty is concerned, there is absolutely nothing in the fact, or in subject-matter, of the interview that interferes with the

<sup>342</sup> Id. para. 11b.

<sup>34312</sup> U.S.C.M.A. 387, 30 C.M.R. 387 (1961). This case should be read in conjunction with United States v. Nation, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958), which struck down an earlier version of the same regulation upheld in Wheeler.

exercise of the applicant's religious beliefs. True, the regulation speaks of the sanctity of marriage, but the reference does not purport to establish the place of marriage in the religious beliefs of a particular applicant . . . To remind, or to inform a person of the fundamental nature of marriage is not to promote or to interfere with his religious beliefs. Nor does the requirement of an interview with a chaplain violate the constitutional prohibition against "an establishment of religion." However high or thick the wall of separation between church and state, the interview provision does not breach that wall. It does not force, influence, or encourage the applicant to profess any religious belief or disbelief . . . . It simply requires the chaplain, whose special training and background indicate his qualifications for the task, to provide information on a matter of great importance to persons who are reasonably expected to need that inform-It does not compel anyone to change his personal attitudes towards religion or marriage. We discern no basis upon which it can reasonably be said that the chaplain's interview aids or discourages any one religion, all religions, or no religion. 344

Assuming that providing information assists the welfare and morale of the command, and with that being the chaplain's area of competence on the military staff, it appears that the court found a valid <u>military</u> purpose served by the requirement. Consequently, it found the requirement constitutional.

#### 5. Ceremonial Activities

The military participates in many ceremonial functions—indeed, marching troops and a military band are perhaps the essential ingredients of an official Government ceremonial function in the United States. Not infrequently, such functions are for a clearly religious purpose—such as a state funeral.

<sup>344&</sup>lt;u>Id</u>. at 389.

Further, at any ceremonial occasion, military regulations provide for an invocation and sometimes a benediction (both clearly religious prayers) by a chaplain. 345

Could an individual serviceman directed to participate in such a ceremonial occasion refuse because of the religious activities involved?

The Army's regulations in question make it clear that the ceremony is a <u>military</u> exercise and not a religious service. 346 While this might be said to be a self-serving declaration which is not dispositive of the issue, it appears that the Supreme Court has simply exempted public ceremonial occasions from any argument that they "establish" religion. In a footnote in <u>Engel v. Vitale</u>, quoted earlier, the Court specifically excluded "patriotic or ceremonial occasions." 347 Even Mr. Justice Douglas in <u>Zorach v. Clauson</u> said "We are a religious people whose institutions presuppose a Supreme Being." 348

While no Supreme Court decision has adjudicated the express issue of the constitutionality of any religious involvement in a public ceremonial occasion, there seems little doubt that the Court would uphold such practices as constitutional.

<sup>345</sup>AR 165-20, 18 May 1966, para. 3<u>f</u>.

<sup>346</sup> Id.

<sup>347</sup> see supra, n. 289.

<sup>348343</sup> U.S. at 313. <u>Compare</u> United States v. Seeger, 380 U.S. 163, 188-193 (1965) (concurring opinion by Justice Douglas).

Thus the individual soldier could probably not make a successful constitutional claim that the First Amendment allows him to refuse to participate in such a ceremonial occasion.

6. Summary and Conclusions Concerning the Establishment Clause

The Supreme Court has ruled that the establishment clause of the First Amendment is not an absolute, that there must be some "accommodation" between religious and government interests. This means that in some way those interests must be balanced. Generally, if the religious aspect of the "accommodation" outweighs the secular governmental interest concerned, an unconstitutional establishment of religion has occurred.

Applying this standard to the military problems that give rise to establishment claims, a strong case can be made for the constitutionality of the military chaplaincy. The government interest involved is to insure that servicemen may freely exercise their religion. There appear to be no reasonably valid substitutes. These considerations, plus others such as the relative maturity of servicemen and the voluntariness of actual attendance at religious services, far outweigh any possible "establishment" of religion by the existence of the military chaplaincy. From dicta contained in Supreme Court opinions, one could, with Justice Goldberg in Schempp, safely predict that the Court would most likely agree, if directly faced with the issue.

The same conclusion could reasonably be made concerning any religious involvement in military ceremonial occasions.

These seem to be too ingrained in the fabric of American life to be considered an "establishment" of religion, notwithstanding some admitted religious involvement. Again based on dicta, one could safely predict that the Court would uphold these activities if they were directly challenged.

When one considers the Army's and Air Force's "character guidance" program and the mandatory chaplain's counselling of servicemen seeking command permission to marry overseas, the problem is more difficult. However, it must be remembered that military chaplains have a staff function within the secular purview of the military, namely the maintenance and creation of morale and welfare. If the chaplain's participation in these programs is viewed from the standpoint of his secular military staff function, there appears to be no unconstitutional establishment of religion simply because the chaplain as such is utilized in both these programs. Indeed, as the staff officer to whom the commander looks as his "expert" in matters of morale and welfare, it is only logical and proper that the chaplain would be used by the commander wherever it was desirable to enhance those traits within the command. While an argument could be advanced that the use of a clergyman to accomplish a secular task is intrinsically unconstitutional, that does not yet seem to be the law.

Both the character guidance program and the mandatory

counselling for command permission to marry overseas could possibly be challenged on the basis that they do not really accomplish any valid military purpose. Therefore, the argument would run, the only thing which they do accomplish is an unconstitutional establishment of religion. This argument seems to go too far, given the clear requirement that the maintenance of discipline can depend to a great extent on the maintenance of a high level of morale and welfare. To the extent that these are indeed accomplished by the two programs in question, that valid military purpose would outweigh any possible claim that the programs "established" religion.

The one area discussed where it seems that a valid claim of an unconstitutional establishment of religion could be made against the military is in the case of the mandatory chapel services at the service academies. Notwithstanding the decision of the district court in Anderson v. Laird, the argument that a valid military training function is served and can be served only by the requirement of mandatory chapel attendance is logically unconvincing. It should be noted that, in contrast to the mandatory character guidance training attendance, it is not merely the fact that clergymen conduct the "training" which makes the service academy problem so grave. Rather it is the fact that the so-called training occurs in the form of mandatory attendance at a purely religious exercise.

# B. Actions Based on Religious Belief

As had been noted earlier, freedom of religion presupposes freedom of belief. Indeed, the one absolute thing about
the First Amendment is that one is absolutely free to believe
anything one wants about religious matters, or anything else,
as far as that goes. However, as also has been noted, when
religious beliefs or any other kind of beliefs become the
basis for action, a different result accrues. The first point
of discussion should be, therefore, how free is a serviceman
to act upon his religious beliefs while he is a member of the
Armed Forces?

### 1. General

It was also pointed out earlier that there is a clear distinction between the freedom to exercise one's religion as such and other forms of action taken because of one's religious beliefs. To repeat Mr. Emerson's statement of this point,

in order to achieve its desired goals, a society or the state is entitled to exercise control over action—whether by prohibiting it or by compelling it—on an entirely different and vastly more extensive basis. 349

The military society is no different.

In the military, standards of conduct are established by military orders. These may take the form of written, standing orders or regulations, or they may be more <u>ad hoc</u> in the

<sup>349</sup> Emerson at 8.

form of a verbal order given to one individual to do or not to do a particular thing at a particular time. What if a serviceman disobeyed an order solely because of a claimed religious belief?

In its discussion of Article 90 of the Uniform Code, which prohibits (among other things) willfully disobeying the order of a superior commissioned officer, paragraph 169b of the Manual for Courts-Martial says "The fact that obedience to a command would involve a violation of the religious scruples of the accused is not a defense." While this sentence is not repeated in the Manual's discussion of the other articles of the Uniform Code which involve the disobedience of other forms of orders, the principle is generally applicable to disobediencies of all forms of orders. Of course no punishment can ever be inflicted for the disobeyance of an illegal order, and, as has been discussed earlier, an order could be illegal because it violated the First Amendment. Thus the complete statement of the law in this regard must be, as stated by the Chief Judge of the Court of Military Appeals when faced with the issue, "If the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience." 350

At first impression, a dilemma may appear. If religious

<sup>350</sup>United States v. Wilson, 19 U.S.C.M.A. 100, 101; 41 C.M.R. 100, 101 (1969).

belief cannot justify the disobedience of lawful orders, but if religious considerations under the First Amendment can determine the basic lawfulness of a military order, is that not the same as saying that religious considerations can indeed be a "defense" to the disobedience of certain military orders?

The answer to this problem is that one must ascertain the lawfulness of the order <u>independent of</u> the particular religious beliefs of the accused serviceman. This is the point which was made by the Supreme Court in the 1878 case of <u>Reynolds v. United States.</u> Reynolds was a Mormon who practiced polygamy, contrary to an act of Congress which made bigamy criminal in the Utah Territory. When prosecuted for bigamy, Reynolds argued that the act of Congress establishing the crime was unconstitutional, since it prohibited him from acting freely in accordance with his religious belief in polygamy. In reply, the Court said:

Laws are made for the government of actions, and while they cannot interfere with religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? . . . Can a man excuse his practices to the contrary [of law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief

<sup>35198</sup> U.S. 145 (1878).

superior to the law of the land, and in effect to permit every citizen to become a law unto himself. 352

Some 65 years later, in the 1943 case of <u>West Virginia</u>

<u>State Board of Education v. Barnette</u>, 353 in a concurring opinion by Justices Black and Douglas, the same principle was repeated as follows:

No well-ordered society can leave to individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. 354

To prevent a serviceman's—or anyone else's—religious beliefs from allowing the individual "to become a law unto himself," the lawfulness of the order, regulation, statute, or whatever imposes the obligation in question, must be tested by the standard of what is best for society as a whole. By definition, this does not necessarily consider the individual's specific religious beliefs; indeed, the determination must be made independent of them so that it will reflect society's beliefs and standards. And when the society in question is the military, military standards must be considered to establish

<sup>352&</sup>lt;u>Id</u>. at 166-167.

<sup>353319</sup> U.S. 624 (1943).

<sup>354</sup> Id. at 643-644.

the intrinsic lawfulness or unlawfulness of the order. Seen in this light, the quoted provisions of the Manual for Courts-Martial and the ruling of the Court of Military Appeals are eminently correct.

A discussion of some specific areas wherein this problem arises follows.

## 2. Saluting

one of the oldest and most commonly-practiced worldwide military customs is the salute. It began as only a military man's way of greeting a comrade-in-arms. However, the
custom has evolved into one where superior officers (only) are
saluted by anyone subordinate in rank to them. In addition,
the salute is also rendered in certain other (and largely ceremonial) occasions; the most common is to salute the flag.

The general compliance with saluting requirements, and especially the military precision with which the salute is rendered, are considered to be indicators of the state of military discipline of both the individual and the unit concerned. If subordinates salute precisely and cheerfully, the commander feels that they will obey orders equally precisely and cheerfully. It will be recalled that earlier in this paper, discipline was defined as a "mental attitude." The salute is an

<sup>355</sup>AR 600-20, 26 Oct. 1971, para. 5-1, <u>quoted supra</u>, part II, p. 145.

outward and visible sign of that inward disciplinary state of mind. Conversely, strict enforcement of the saluting requirement is considered to serve to achieve discipline. Saluting is a simple act; it requires no real thought. If it becomes automatic, it is an easy first step to automatic response to superior orders in general. Thus to enforce the saluting requirement teaches discipline, as well as becoming indicative of it, once the lesson is learned. To the military officer in command, the salute is a vital factor of discipline.

Could a soldier refuse to salute because of his religious scruples?

Although in its 1940 decision in Minersville School District v. Gobitis, 356 the Supreme Court held that a requirement to pledge allegiance to the United States flag was a constitutional exercise of governmental power, it reversed itself in the 1943 case of West Virginia State Board of Education v.

Barnette. 357 The Barnettes were Jehovah's Witnesses, and their children refused to execute the pledge of allegiance based on the injunction found in Exodus 20: 4 and 5. The Court upheld their right to do so, for religious reasons. However, in a footnote, the Court had the following comment to make about the military:

The Nation may raise armies and compel citizens to give military service. Selective Draft Law Cases.

<sup>356310</sup> U.S. 586 (1940).

<sup>357319</sup> U.S. 624 (1943).

245 U.S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life. 358

In 1941, after the <u>Gobitis</u> case but before <u>Barnette</u>, the Fifth Circuit Court of Appeals considered the claim of a soldier that he did not have to salute on religious grounds. 359 The soldier had joined the Watch Tower Bible and Tract Society after his voluntary enlistment in the Army, and he contended that its religious tenets prohibited him from executing the salute. He was convicted by court-martial for refusing to salute, and the case was before the appellate court on appeal from a denial of a request for habeas corpus. The court upheld the denial of habeas corpus, saying that

Military regulations requiring a soldier to salute his superior officers are not intended to interfere with religious liberties, and the enforcement of the regulations by a proper military tribunal does not violate the Constitution of the United States.<sup>360</sup>

The court cited Gobitis as its authority.

Research has failed to disclose any case where the civilian courts have considered the constitutionality of the military salute requirement since the 1941 Fifth Circuit case just quoted. Nor has any case in the Court of Military Appeals been

<sup>358</sup>Id. at n. 19, p. 642.

<sup>359</sup> McCord v. Page, 124 F.2d 68 (5th Cir. 1941).

<sup>360</sup> Id. at 69.

found. However, two Air Force Boards of Review361 considered the issue in 1954 and 1957, respectively. 362 Both held essentially the same as the Fifth Circuit did in 1941--that military discipline was the goal which the saluting requirement sought to achieve, and that the military purpose overrode any religious convictions on the part of the individual. The secular purpose of military discipline, if truly assisted by the saluting requirement -- and no one has ever seriously contended that it does not serve its function in that regard--justifies the requirement of the salute. And to the extent that an individual soldier acts contrary to that requirement, based on his personal religious convictions, those religious convictions afford him no defense to prosecution for a failure to obey the military requirement. It is likely that a consideration of this nature prompted the footnote by the Supreme Court in the Barnette case (quoted on the preceding page at note 358).

It should be pointed out that the saluting requirement is not a serious disciplinary problem in the military today, at least from a religious standpoint. Most religious sects—not—ably the Jehovah's Witnesses—which oppose saluting on religious

<sup>361</sup>Boards of Review were intermediate appellate courts established within the military services themselves, falling between the court-martial and the Court of Military Appeals. Their name has now been changed to Courts of Military Review; their composition remains the same as before. See U.C.M.J., Art. 66.

<sup>362</sup>United States v. Cupp, 24 C.M.R. 565 (ABR 1957); United States v. Morgan, 17 C.M.R. 584 (ABR 1954).

grounds are also generally exempted from military service altogether as conscientious objectors. Thus the problem of their refusing to salute for religious reasons could arise only if the individual's religious convictions changed after he became a serviceman—which was the situation in the Fifth Circuit case cited earlier. This perhaps explains the paucity of cases in this area.

## 3. Uniform Requirements

Much of what has just been said about saluting is equally applicable to military uniform requirements. A serviceman wearing a properly cleaned and pressed uniform, with shined shoes and insignia, and with proper accoutrements, is indicative of a high state of discipline in the command. 364 Concurrently, the military demand that the serviceman wear that kind of uniform helps to instill discipline in the serviceman. In addition to the requirements concerning the actual fabric, cut, color, and accoutrements of the uniform per se, also fairly included in the phrase "uniform requirements" are certain requirements of personal appearance. The length of the hair, the weating of various styles of beards and moustaches, and the wearing of jewelry (in the sense of personal adornments in addition to those accoutrements to the uniform itself) are all subject

<sup>363</sup> See supra, n. 359.

<sup>364</sup> Appearance is also cited in the Army's definition of discipline, quoted supra, Part II, p. 145.

to regulation.

In recent times, servicemen who profess adherence to the Black Muslim religion have claimed that certain items of jewelry (notably a single earring worn in only one pierced ear lobe) and full beards are required to be worn by the tenets of their religion. In general, jewelry worn physically "on" the uniform is prohibited; a pocket watch chain would be an example. However, jewelry worn on the bodyrings, religious medallions on a chain around the neck inside the shirt, wrist watches, etc.—is not prohibited. Temale members of the Army are prohibited from wearing earrings with the uniform. Beards are prohibited in the Army and Air Force, although permitted in the Navy. Where prohibited, could a serviceman demand to wear an earring and a full beard because of his religious convictions?

To the extent that these acts are based on personal religious motives, they would not seem to be any more justified than a refusal to salute. Like the salute, the uniform requirements serve a valid military purpose, which would most

<sup>365</sup>AR 670-5, 18 Jan. 1971, para. 1-5, as interpreted by Op. TJAG-Army, JAGA 1968/3617 (15 Mar. 1968) (interpreting predecessor regulation which was the same in this regard as current version); see also AFR 30-16, 8 Nov. 1961; U.S. Navy Uniform Regs., Ch. I, 8 4, Art. 044.

<sup>366</sup> AR 670-30, 13 May 1969, para. 1-4e.

<sup>367</sup>AR 600-20, 28 Apr. 1971, para. 5-39<u>c</u>(3); AFR 30-1, 1 Aug. 1971, para. 17<u>a</u>(3).

likely outweigh any religious scruples calling for actions to the contrary. Research has not disclosed any reported case in either the military or civilian courts where a religious defense has been raised to a prosecution for a violation of the uniform requirements.

Although no reported case has been discovered, The Judge Advocate General of the Army has rendered several opinions in this area. 368 Even though there is no regulation specifically prohibiting male servicemen from wearing an earring, The Judge Advocate General ruled that Black Muslims may lawfully be prohibited from wearing an earring, and that they could lawfully be ordered to shave. These opinions were based not only on the basis of achieving military discipline, but also on a finding of fact that the Black Muslim religion did not make these modes of dress and appearance mandatory; rather, they were found to be only a personal, "commemorative" act on the part of the servicemen themselves, visibly to demonstrate their adherence to the Black Muslim religion.

Interestingly enough, The Judge Advocate General of the Army has recognized one exception to the uniform requirements based on a purely religious ground, in a case where a bona fide member of the Sikh religion was inducted. The Judge Advocate General concurred in a ruling that the Sikh was entitled to re-

<sup>368</sup>op. TJAG-Army, JAGA 1968/3617 (15 Mar. 1968); JAGA 1960/3793 (22 Mar. 1960); JAGA 1960/8239 (10 Mar. 1960).

tain his beard and his uncut hair, and to wear his traditional turban rather than a military head-covering, because these modes of appearance and dress are specifically <u>required</u> by the Sikh religion. However, the ruling was limited to inductees only; if a Sikh <u>volunteered</u> for military service, The Judge Advocate General ruled that he would simultaneously volunteer to conform to the uniform requirements. 369

The Sikh case ruling, if extended to other religious groups who in the future formulate dress and appearance requirements for their adherents, could seriously undermine the factual uniformity of the uniform requirements in the military. It is therefore submitted that the Sikh ruling is unique and will probably not be extended—indeed, it is extremely limited since there are very few Sikhs in the United States<sup>370</sup> and probably even fewer who are drafted. The express exclusion of Sikhs who volunteer for enlistment is indicative of an intent to limit the decision to its facts. This is probably wise, if the military truly believes that the uniform requirements do assist in both achieving discipline and being indicative of the state of discipline within a command—and, again, no one has ever seriously contended the contrary. Limiting the decision would also

<sup>369</sup>op. TJAG-Army, JAGA 1970/4018 (4 May 1960).

<sup>370</sup> Sikhs in the United States number less than 50,000; the Statistical Abstract of the United States lists religious groups only if they exceed that number, and Sikhs are not listed. See 1970 Statistical Abstract of the United States 40.

be consistent with the general rule that personal religious convictions do not justify disobedience—or exceptions—to standing military directives which have a valid military purpose.

# 4. Compulsory Medical Treatment

cartoon situation to depict a long line of inductees standing in their shorts getting shots, simultaneously in each arm, while making some witty comment. Those days of mass innoculations are generally gone in the military of today; nonetheless, the author's health records show some 57 innoculations plus the oral polio vaccine series over a period of 14 years' combined Army R.O.T.C. and active Army duty. Military regulations still require certain "basic" innoculations, establish time-tables for booster shots, and require certain other innoculations prior to duty in various parts of the world. The addition, military regulations specifically provide for compulsory medical treatment of illnesses, over the objections—religious or otherwise—of the serviceman. 372

<sup>371</sup>AR 600-20, 28 Apr. 1971, para. 5-32, as interpreted by Op. TJAG-Army, JAGA 1968/4004 (17 May 1968); JAGA 1966/4314 (9 Sep. 1966); JAGA 1964/3814 (27 Apr. 1964) (all interpreting predecessor regulations which were all the same in this regard as the current version).

<sup>372</sup> Id. The Navy requirements are the same; see U.S. Navy Manual for the Medical Dept. (MANMED), Art. 18-2 through 18-15. The Air Force regulations contain no citation which could be discovered specifically making the same statement, although it undoubtedly is the policy followed.

It is a well-known tenet of certain religious sectsprimarily the Christian Scientists--that formal medical treatment will not be used. However, these sects do not necessarily oppose war as a general rule, so their members could well
be servicemen. Could such a serviceman refuse innoculation
or medical treatment for an illness or battle wound, based on
his religious beliefs?

The basic principles in this area were established in the 1905 Supreme Court decision in <u>Jacobson v. Massachusetts.</u> 373 There a smallpox vaccination was required by a local ordinance, passed under delegated authority from the State legislature. The reason for the ordinance was a smallpox epidemic, and the vaccination was free. Jacobson refused to be vaccinated and was prosecuted for disobeying the ordinance. The Court held the ordinance constitutional, because the need to protect the public health in general overrode the individual's religious scruples against it. The Supreme Court reaffirmed this rule in 1922 in <u>Zucht v. King.</u> 374 In <u>Prince v. Massachusetts</u> 375 in 1944, although the issue before the Court involved restrictions on a minor distributing religious literature on a public street in violation of certain State laws, the Court said <u>obiter</u>

<sup>373&</sup>lt;sub>197</sub> U.S. 11 (1905).

<sup>374&</sup>lt;sub>260</sub> U.S. 174 (1922).

<sup>375&</sup>lt;sub>321</sub> U.S. 158 (1944).

that a parent

. . . cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds [citing <u>Jacobson v. Massachusetts</u>]. The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health.

In 1952 the Supreme Court denied certiorari to an Illinois case<sup>377</sup> where a blood transfusion for an eight-day-old child had been deemed medically necessary to save the child's life, yet the parents had refused to consent on religious grounds. The Illinois courts appointed a guardian for the child and directed the guardian to consent to the transfusion, which led to the issue ultimately coming before the Illinois Supreme Court.

Based on these precedents, it would appear that to protect the health of the community as well as that of the individual himself, innoculations may lawfully be required; and that to save the life of an individual, medical treatment may also be required. Certainly, in the military, protection of the health of all is vital to insure military preparedness. Additionally, the health of the individual himself is necessary to military efficiency. Consequently, it would appear that there is both sound logic and a sound legal basis for the military requirement of innoculations and medical treatment,

<sup>376</sup> Id. at 166-167.

<sup>377</sup> People ex rel. Wallace v. Labrenz, 411 III. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952).

regardless of the individual's religious scruples to the contrary.

The principle is in a sort of back-handed way supported by the very interesting reasoning in a 1968 decision by the Federal District Court for the Eastern District of Arkansas in United States v. Carson. 378 Carson had been classified as that category of conscientious objector who could be inducted and given noncombatant duties. He refused induction in that category and, upon his prosecution for so refusing, he argued that he should have been exempted totally from military service. The basis for his claim was that he would "be forced to submit to medication and vaccinations to which he is conscientiously opposed."379 The court held that exempting those who had religious scruples against war but not those who had religious scruples against mandatory medical treatment would be an unconstitutional discrimination among various religious beliefs. 380 The court reversed Carson's conviction and directed that he be given full exemption from military service as a conscientious objector. Thus the case affirms the standard rule that had Carson lawfully been required to serve, he would also lawfully have been required to undergo

<sup>378&</sup>lt;sub>282</sub> F. Supp. 261 (E.D. Ark. 1968).

<sup>379</sup> Id. at 269.

<sup>380</sup> Id. at 268. <u>Compare</u> Welsh v. United States, 398 U.S. 333, 344-367 (1970) (concurring opinion by Justice Harlan).

medical treatment and vaccinations as the military deemed necessary.

One possible erosion of the seeming firmness of this rule, however, arises in a 1965 Illinois Supreme Court decision in In re Brooks' Estate. 381 There the court held that an elderly woman with no dependents could, as an exercise of her constitutional right to freedom of religion, refuse certain medical treatment—even if her death ensued from the lack of the treatment in question—since no life or health other than her own was endangered. Presumably the danger to "no life or health" included no diminution of financial or other responsibility for dependents, since the lady's lack of dependents seemed to be a weighty factor in the decision as well. Based on this decision, a military author has posed an interesting hypothetical. He writes:

The significance of this case might be clearly dramatized in the case of a young unmarried soldier who is gravely wounded, to the extent that he can never perform military duties again. If he decided on religious grounds that he desired to be permitted to die rather than spend months, years, or the rest of his life totally incapacitated, his obvious incapacity for further military duties would deprive the Army of any proprietary interest in his [future] service. Further, there would be no danger to those other than himself as only his own life would be involved. It would appear that the Illinois case would be good authority to require that the young soldier's wishes be honored. Similar considerations would also apply in cases of lethal doses of radiation or chemical or biological agents. 382

<sup>38132</sup> Ill.2d 361, 205 N.E.2d 435 (1965).

<sup>382</sup>Foreman, supra, n.326 at 84.

What result would truly occur in a real case remains to be seen. However, with the traditional regulations reading as they do—that no one can refuse medical treatment—it is like—ly that the hypothetical young soldier's wishes would be ignored by military medical personnel.

# 5. In-Service Conscientious Objectors

One recurring problem involving alleged in-service conscientious objectors has arisen time and again when the individual concerned has not been granted either discharge from the service or noncombatant status, whichever it is to which he felt his religious beliefs entitled him. As a result of this denial, the purported in-service objector has refused to perform any military duties, wear the uniform, and so on, all based on what he believes his religious views dictate. Can such a serviceman make a valid claim of this nature, based on his religious beliefs?

While it is not intended to discuss the conscientious objector problem in depth here, a few comments about the constitutional status of the conscientious objector are in order.

The Supreme Court has never held that a conscientious objector to military service has a constitutional right to exemption therefrom. Rather, the dicta in the first Mr. Justice Harlan's 1905 opinion in the case of <u>Jacobson v. Massachusetts</u> 383

<sup>383&</sup>lt;sub>197</sub> u.s. 11 (1905).

states the constitutional point of view:

The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will" . . .; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. 384

Thus it has been consistently said that it is only a matter of "legislative grace" that conscientious objectors are exempted either totally from military service, or from combat duties. As the Supreme Court said, again in dicta, in the 1931 case of <u>United States v. Macintosh</u>, 385 "The privilege of a native-born conscientious objector to avoid bearing arms comes, not from the Constitution, but from acts of Congress." This principle seems still viable today.

The majority opinion in the latest Supreme Court case where the conscientious objector problem was discussed in depth seemed to gloss over the constitutional issue; at least the majority opinion never reached it. It is interesting to note that in his concurring opinion in that case, the second Justice Harlan repeated the principle stated by his grandfather in 1905: "Congress, of course, could entirely consistently with the re-

<sup>384</sup> Id. at 29.

<sup>385&</sup>lt;sub>283</sub> U.S. 605 (1931).

<sup>386</sup> Id. at 624.

quirements of the Constitution, eliminate <u>all</u> exemptions for conscientious objectors." 387 However, Justice Harlan went on to say that he thought that Congress' exemption, based as it now is only on religious beliefs, "established" religion over non-religion and therefore violated the First Amendment.

Whatever the constitutional status of one's "right" to be a conscientious objector and to avoid full military service thereby, it appears that the military has at least avoided the problem to the greatest possible extent. This is because the military treats the in-service conscientious objector the same as his earlier-deciding brother is treated by Congress. This administrative decision is imposed by a Department of Defense directive. Thus whatever constitutional ramifications to the in-service conscientious objector's views there might be, it would appear that the military is no greater an "offender" than Congress. Notwithstanding, the best that can be said is that no one has a constitutional right to the exemption from service altogether, or to the assignment to noncombatant duties.

This being the case, how fares the in-service applicant for conscientious objector status who, having been denied, acts according to his beliefs anyway? In case after case, the stan-

<sup>387</sup>welsh v. United States, 398 U.S. 333, 356 (1970).

<sup>388</sup>U.S. Dept. of Defense Directive No. 1300.6, 20 Aug. 1971, para. III. [All such directives will hereinafter be cited as "DoD Dir." with the number and date following.]

dard rule that religious scruples are no justification for the disobedience of otherwise lawful orders has been applied, 389 not only by the military courts, but also when the individuals concerned have petitioned the civilian courts for habeas corpus, seeking their discharge on the theory that the military decision denying them conscientious objector status was incorrect. 390 Further, since in-service conscientious objector status arises only through an administrative requirement and an administrative decision, some civilian courts have been reluctant to delve into the administrative process whereby the serviceman was denied his requested discharge or transfer to noncombatant duties. 391

Under these circumstances, it is particularly interesting to see how the Court of Military Appeals has approached this problem. It was noted above that the standard approach was to apply the rule that religious scruples are no justification for the disobedience of otherwise lawful orders. However, in <u>United States v. Noyd</u>, <sup>392</sup> the court addressed itself

<sup>389</sup> For a lengthy but outstanding discussion of the impossibility of allowing military personnel to become "a law unto themselves" if they were allowed to be selectively obedient only to those orders with which they personally agree, see United States v. Noyd, 18 U.S.C.M.A. 483, 491 and 493; 40 C.M.R. 195, 203 and 205 (1969).

<sup>390</sup> See, e.q., Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.); affirmed, 378 F.2d 538 (10th Cir.) (per curiam); cert. denied, 389 U.S. 1022 (1967).

<sup>391</sup> See, e.q., Brown v. McNamara, 287 F.2d 150 (3d Cir. 1967), cert. denied, 390 U.S. 1005 (1968).

<sup>392</sup> see supra, n. 389.

to the issue of whether the military orders to perform duties inconsistent with the defendant's claimed conscientious objector status were lawful under all circumstances. In Noyd, the court looked to the provisions of the applicable Department of Defense directive and found that it prohibited, to the maximum extent possible, imposing duties on applicants for conscientious objector status which were inconsistent with their professed claims. 393 Based on this rule, the court determined that when military orders were issued subsequent to a wrongful denial of a request for conscientious objector status, and when the military orders in question were inconsistent with the requested status, the provisions of the Department of Defense directive would continue in force--thus making all such subsequent, inconsistent military orders unlawful. However, as Captain Noyd's application for discharge was found to have been correctly denied, he secured no relief from the announcement of the new rule.

Beginning with <u>United States v. Stewart</u><sup>394</sup> and continuing in <u>United States v. Larson</u>, <sup>395</sup> Chief Judge Darden backed away from the <u>Noyd</u> rule. He limited the <u>Noyd</u> rule to the case where the application was still <u>pending</u>, and he determined that

<sup>393</sup> DOD Dir. 1300.6, 20 Aug. 1971, para. IV.H.

<sup>394&</sup>lt;sub>20</sub> U.S.C.M.A. 272, 43 C.M.R. 112 (1971).

<sup>395&</sup>lt;sub>20</sub> U.S.C.M.A. 565, 43 C.M.R. 405 (1971).

after the application had been finally acted upon, rightly or wrongly, the lawfulness of any subsequent military orders was unaffected by the decision. Finally, in United States v. Lenox, 396 (new) Judge Duncan sided with Chief Judge Darden, over Judge Quinn's dissent, to limit the Novd rule only to orders issued while conscientious objector applications are pending, and to reject it in cases where final action has been taken. The court specifically held that even if the action on the conscientious objector application were incorrect, that would not serve to terminate the obligation which every serviceman has, namely to obey all lawful orders. Thus it now appears that an in-service applicant for conscientious objector status who, having been denied, acts according to his beliefs anyway, will indeed be subject to the standard rule that religious scruples or any other personal belief will not be a valid defense to the disobedience of otherwise lawful military orders.

Mention must be made of the Supreme Court's decision in <u>Parisi v. Davidson</u>, 397 which was decided after the Court of Military Appeals decided <u>Noyd</u>, <u>Stewart</u>, and <u>Larson</u>, but before it decided <u>Lenox</u>. The actual holding in <u>Parisi</u> relates

<sup>396</sup>United States v. Lenox, U.S.C.M.A. C.M.R. (1972) [U.S.C.M.A. docket No. 24,336, decided 21 April 1972].

<sup>397405</sup> U.S. 34 (1972) [92 S.Ct. 815; cited hereinafter to 92 S.Ct. citation].

to the issue of when the Federal courts may entertain habeas corpus suits in in-service conscientious objector cases—
the issue centering around when the serviceman in such cases will be considered to have exhausted his military remedies so that the Federal civilian courts may hear the case under the old <u>Gusik v. Schilder</u> rule. The Court clearly ruled that a serviceman does not have to be tried by court-martial and raise the defense of the incorrectness of the administrative determination there, in order for his case to be "final."
(It might be added that now, under <u>Lenox</u>, raising such a defense would be futile as well.)

However, the Supreme Court did discuss the Novd rule as a necessary adjunct to its decision, and concluded that "its present vitality is not wholly clear," 398 citing United States v. Stewart. Specifically, the Court noted that even if Parisi had been able successfully to raise the alleged incorrectness of the administrative determination on his conscientious objector application at his court-martial, that would only have secured his acquittal of charges for disobeying inconsistent military orders; it would not have secured for him whatever status was requested by his conscientious objector application and erroneously denied. Thus the Court ruled that since raising the defense at a court-martial could not secure the relief required, it would not be a prerequisite to a suit in habeas corpus in the Federal civilian courts—where appropriate

<sup>39892</sup> s.ct. at 820.

relief could indeed be secured.

The Court of Military Appeals in Lenox discussed the Supreme Court's <u>Parisi</u> decision. While not specifically saying so, the clear import of the Court of Military Appeals' opinion is that it felt compelled to make clear the <u>Novd</u> rule, especially since Justice Stewart in <u>Parisi</u> had commented on its confusion. Consequently, it appears that all <u>Parisi</u> did relative to the problem of the lawfulness of military orders issued subsequent to the denial of a conscientious objector claim was to goad the Court of Military Appeals into making its position clear.

But that is not the end of the matter, entirely. What if the Supreme Court were to hold that one has a constitutional right to be a conscientious objector? If this occurred, clearly all courts would be required to adjudicate the validity of any administrative decision where conscientious objector status was claimed to have been wrongfully denied. The lawfulness of any subsequent military orders inconsistent with the professed conscientious objector status would likewise depend on the validity of the administrative determination. Moreover, it appears that all the members of the Court of Military Appeals would concur with this proposition. Judge Quinn believes that inconsistent orders ought to be a defense anyway, if they come after an incorrect denial of an administrative request for conscientious objector status. Chief Judge Darden stated in

United States v. Stewart that one of the reasons why he would limit the Novd rule only to pending application cases was because no one has a constitutional right to be a conscientious objector. Thus it is clear that if one did have such a right, Chief Judge Darden would apply a Novd rule even to subsequent inconsistent orders. And since Judge Duncan quoted Chief Judge Darden's views in Stewart in United States v. Lenox, it appears he would concur.

Conversely, if the Supreme Court were ever to hold that conscientious objector status based on religious belief is unconstitutional because it "establishes" religion, or if either Congress or the Department of Defense were to revoke the current provisions for granting conscientious objector status, then it could be safely predicted that even the Noyd rule as it now stands, relative to inconsistent military orders being issued when conscientious objector applications are pending, would be withdrawn.

But in any event, the principle that a serviceman is not free to act in accordance with his personal religious beliefs, when to do so would conflict with otherwise lawful military orders, remains a valid, viable principle. All that the Noyd-Lenox cases do is make a determination whether, in the specific and particular situations there involved, certain military orders are lawful. Thus they in no wise affect the general rule; indeed, they support it. Even if the "right" to be a conscien-

tious objector is withdrawn altogether, the principle would still hold true-there simply would be no time when the <u>Noyd</u> rule would affect the validity of military orders.

Thus whatever way the conscientious objector problem as such is viewed, a serviceman has no right to act with complete impunity because of his personal religious beliefs. He must comply with otherwise lawful military orders—whatever those are!—regardless of his personal beliefs.

# C. Free Exercise of Religion

# 1. Attending Religious Services

Perhaps the most obvious example of "exercising" one's religion is to attend religious services.

The various acts of Congress establishing the military chaplaincy all require the conduct of religious services on Sunday. 399 Concomitant with this mandate, military regulations traditionally provide that all military duties be reduced to the minimum necessity on Sundays. 400 And "mecessity" means exactly what it says in this case, with the real implication being "military necessity," of course. Obviously the

<sup>399</sup> See supra, n. 275.

<sup>400</sup> AR 165-20, 18 May 1966, as changed by Change No. 3, 1 Aug. 1968, para. 10b; AFR 265-1, 26 Aug. 1968, para. 6a(1); Navy regulations simply discuss the "observance of Sunday," Navy Regs. 0711, para. 1. This is not inconsistent, however, with the statutory provisions pertaining to the Navy in this context. See supra, n. 275.

level of military necessity would be higher on a Navy ship under way at sea than at other places; in Vietnam, the Army conducted business on a full seven-day week basis.

This was the state of affairs until January 1971. If one were a Christian, he was in a good position to be free to exercise his religious views in the traditional way by attending church on Sundays. However, if the serviceman were a Jew or a Seventh-Day Adventist or a member of another religious sect which held some day of the week other than Sunday as the Sabbath, the situation was not so good. Army regulations require that such persons be excused to attend religious services only when "no military requirement prohibits." There was no indication of the prohibition being based on military necessity; and clearly there can be a military "requirement" which is not a military "necessity." It should be noted, however, that the same provisions applied to anyone who desired to attend religious services on a day other than Sunday--such as Ash Wednesday or Good Friday.

In the <u>Sunday Closing Law Cases</u>, 402 the Supreme Court

<sup>401</sup>AR 165-20, 18 May 1966, as changed by Change No. 3, 1 Aug. 1968, para. 10c; Air Force regulations are more lenient in this regard: The commander is required to "insure that military personnel who observe days other than Sunday as regular days of worship or liturgy are excused from duty to attend these services. AFR 265-1, 26 Aug. 1968, para. 6a(1)(b). The Navy regulations are silent in this regard; however, again this is not inconsistent in light of the statutory provisions pertaining to the Navy in this context. See supra, n. 275.

<sup>402&</sup>lt;sub>See supra</sub>, n. 286.

upheld a statutory requirement that businesses close on Sunday, because it found the requirement to have evolved into a <u>secular</u> requirement for a day of rest. The social and humanitarian benefits of this requirement were found to outweigh any religious benefits which might accrue to certain religious groups.

In contrast, however, the mandate of Congress is that military chaplains hold religious services on Sunday, and the military regulations make Sunday a reduced duty day specifically to facilitate the attendance of servicemen at Sunday religious services. Under this posture of facts, it is seemingly difficult to argue that the military "Sunday duty reduction requirement," if you will, has a secular purpose. If it does, military regulations do not articulate that secular basis. On the contrary, they articulate a religious purpose--and one which clearly favors Sunday-Sabbath worshippers over others. A serviceman who does not hold Sunday as his Sabbath therefore could apparently contend with some persuasiveness that both Congress and the military have made both an unconstitutional preference of one religious group (the Sunday-Sabbath group) over other groups, as well as prohibiting the exercise of his particular religious beliefs as freely as other groups can exercise their religious beliefs within the military context.

As bad as this may appear, in January 1971 a change in Army policy was effected--possibly for other reasons--which nonetheless had a beneficial impact in this area. The Army

made Saturday a non-duty day, effective January 1971--co-equal with Sunday in the requirement that military duties be reduced to those of strict military necessity. 403 Thus those observing Saturday as their Sabbath are now in the same position as those observing Sunday. While there are obviously other religious groups (notably Moslems) who hold other days of the week to be their Sabbath, clearly the line must be drawn somewhere. And since the vast majority of Americans hold either Saturday or Sunday to be their Sabbath, it hardly seems unconstitutional that those days which fit the vast majority's preferences have been made free for the majority to observe whatever religious services they wish--or, indeed, to do whatever they please.

Further, one suspects that if the military were pressed, it could make a substantial case that these two days of minimal military duty requirements in fact now serve the same secular purposes as civilian Sunday closing laws—even though that intent is not articulated in the regulations. Just as the Supreme Court found a socially—beneficial and humanitarian result to accrue from a day of rest in civilian life, the military in this sense is no different from any other business. While the requirement for reduced duty on Sunday may have begun in the military for religious motives, just as the civilian Sunday

<sup>403</sup>There is no documentary evidence of this change; it was a change in policy announced by the Army Chief of Staff at an Army Commanders' Conference at the Pentagon on 30 Nov. 1970, to be effective January 1971.

closing laws did, the military's change from a purely autocratic concept of operation to a managerial concept may have changed the requirement into a secular one, just as in civilian life. The military could probably produce statistics showing that chapel attendants represent only a small proportion of the total population of the military--thus indicating the secular character of the non-duty days. Also, it must be emphasized that, even though the regulations as now written are articulated in terms of making it possible for military personnel to attend religious services per se by reducing Sunday duties to the bare minimum, actual attendance at such religious services is clearly stated to be strictly voluntary. 404 Thus the purpose of the regulations even as now written has always been only to facilitate attendance, not to require or indeed even to encourage attendance. While it would be helpful to one arguing the military case for not only the wording of the military regulations themselves but also the wording of the statutes as well to be changed, even under the present language, the military and Congress should not be held accountable for clearly outdated and inaccurate language when the facts are otherwise.

Finally, it should be stressed that even under the present language of the military regulations, all restrictions are couched in terms of military necessity. Even on Sundays (and now on Saturdays as well in the Army), those duty requirements which

<sup>404</sup> see supra, n. 307.

are necessary must continue. Thus a serviceman's right to complete, unfettered freedom to exercise his religion must be balanced against military necessity—and when that is done, the result is usually in favor of the military. The footnote to Justice Jackson's opinion in West Virginia State Board of Education v. Barnette, quoted earlier, is the key: "It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold in—violable as to those in civilian life."405

It is interesting to note, in this connection, that there has been no reported case involving a serviceman in Vietnam who claimed for religious reasons that he did not have to perform military duties on his Sabbath—and, as has been stated earlier, neither Saturday nor Sunday is a non-duty day in Vietnam.

### 2. Other Religious Observances

Attendance at formal religious services is not the only way in which one may "exercise" his religion. However, as one moves away from attendance at a traditional religious service to another form of exercising one's religious beliefs, the restrictions in both civilian and military life become much greater.

As noted earlier, in Reynolds v. United States 406 the

<sup>405319</sup> U.S. at 642, n. 19.

<sup>406&</sup>lt;sub>98</sub> U.S. 145 (1878).

Supreme Court held that a Mormon could not practice polygamy as an exercise of his religious beliefs, if polygamy had been made illegal by legislative action. The Court also pointed out that human sacrifices would still be murder even if done in the name of a religious "exercise," and that <u>suttee</u> could also be prohibited by law.

Suppose, then, that a serviceman believed in fasting for religious reasons. And suppose that he fasted so diligently over a period of time that he became too weak to perform his military duties. Or suppose that another serviceman believed in some form of flagellation for religious reasons, and that he did such a good job of it that he incapacitated himself for the proper performance of his military duties. Both these servicemen could most likely be prosecuted for willful incapacitation for the proper performance of duty, under Article 134 of the Uniform Code. The military clearly has a right to the services of the servicemen, and they cannot by their own decisions—based on religious considerations or otherwise—deprive the military of those services.

It is interesting to note that a prosecution under Arti-

<sup>407</sup> See United States v. Taylor, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968). Taylor slashed his wrists and did a good enough job that hospitalization and loss of actual work-time resulted. The principle which the case stands for is that any voluntary action which results in incapacitation may be prosecuted under Article 134 of the Code, even when a prosecution under Art. 115 would not lie because the intent was not to avoid duty.

cle 115 of the Uniform Code would <u>not</u> lie here. That article prohibits willful incapacitation for the specific purpose of <u>avoiding</u> military duties. The religious motive in each of the posed hypothetical situations would make Article 115 inapplicable, although it would not, as stated above, prohibit a prosecution for a simple misdemeanor under Article 134. 408 It also should be noted that if a serviceman absented himself without permission in order to attend a religious service or a religious retreat, he can be punished. 409 Again, his religious motive would be no defense to the fact that his actions deprived the military of his services.

There are some who, in this day and age, claim that the use of drugs and marihuana are a proper and appropriate part of their religious worship exercises. In the military, as well as in civilian life, the use of drugs and marihuana is prohibited. 410 Concerning the use of drugs, an interesting

<sup>408&</sup>lt;u>Id</u>. In <u>Taylor</u>, his psychological state was considered the reason why he slashed his wrists, not an intent to avoid military duties. The analogy would be that any action, voluntarily done for a reason other than to avoid military duties, would, like <u>Taylor</u>, authorize punishment under Article 134.

<sup>409</sup> Absence without leave is proscribed by U.C.M.J., Art. 86.

<sup>410</sup>wrongful use, possession, transfer, or sale of marihuana or narcotic drugs is prohibited under U.C.M.J., Art. 134, as implemented by M.C.M., para. 127c (p. 25-16), and by App. 6c (p. A6-22). Wrongful use, possession, transfer, or sale of other non-narcotic drugs is prohibited by regulations, and therefore violations are punishable under U.C.M.J., Art. 92.

departure from the <u>Reynolds</u> rule was made by the California Supreme Court in its 1964 decision in <u>People v. Woody</u>. In that case, a group of Navajo Indians was using peyote in a religious ceremony. State officials intervened and arrested, among others, the accused Woody. When he appealed his conviction to the California Supreme Court, the court ruled that "since the practice does not frustrate a compelling interest of the state, "412 it was not unlawful and was protected as a form of religious worship. The court did point out that the particular religious sect was "recognized," and that its charter specifically indicated that a tenet of the sect was the use of peyote as a part of its worship ceremonies.

It is doubtful that <u>Woody</u> will be extended beyond its facts. During the time Woody was using the peyote, he was not driving a car or doing anything else where he would be likely to harm a public interest. Servicemen, however, must be readily available for military duty at all times. In addition, there appears to be no court decision extending <u>Woody</u> to any other situation. It appears to be unique and limited strictly to its own facts. Indeed, in the Supreme Court's 1969 decision in <u>United States v. Leary</u>, 413 the Court only casually mentioned in passing, as it were, the fact that Leary con-

<sup>41140</sup> Cal.2d 69, 394 F.2d 813 (1964).

<sup>412394</sup> P.2d at 815.

<sup>413&</sup>lt;sub>395</sub> U.S. 6, 29 (1969).

importation of marihuana into the United States from Mexico, that the marihuana was to be used for "religious" purposes. It is submitted that the use of peyote by Navajo Indians is a unique situation and that it will be--much as The Judge Advocate General of the Army's concurrence to allow an inducted Sikh to retain his beard, uncut hair, and turban--most likely limited strictly to the facts of the case.

D. Summary and Conclusions Concerning the Free Exercise Clause

In the military, the maintenance of a <u>disciplined</u> and <u>readily-available</u> force of <u>able-bodied</u> men is mandatory. Without them a military organization is simply not a military organization. Recognition of this fact is the key to determining what religious freedom a serviceman has.

Because of the necessity to maintain such a force, even the traditional "exercise" of religion, in the form of attending religious services, is itself subordinated to military necessity. This is because if one is at a religious service, he is simply not present to perform any necessary military duties. Thus if his performance of a military duty is in fact a military necessity, his "right" to attend religious services becomes subordinate.

Further, once one begins to consider various claims of the "right" to "exercise" one's religious beliefs in forms other

than attendance at a traditional religious worship service, in the military context the law has tended to categorize most such other claims as "action" rather than the "exercise" of religion. But given the key fact as stated above, this is neither unreasonable nor illogical. Requiring servicemen to salute superior officers and to wear a certain uniform are both means to achieve and to measure discipline. Additionally, to insure the availability of military personnel, Congress has made certain cases where a serviceman deprives the military of his services, without permission, criminal. This is the basis for Article 86 of the Uniform Code (absence without leave). To insure that servicemen are able-bodied, they must be kept healthy and they cannot be allowed to spread disease to others. This justifies mandatory innoculations and medical treatment. In addition, servicemen cannot be allowed, for religious or for any other reason, intentionally to incapacitate themselves for the proper performance of their duties. This is reasoning behind an Article 134 prosecution for willfil incapacitation for purely religious motives. The concepts of discipline, availability for the performance of duties, and the existence of an able-bodied force are the rationale behind the Manual for Courts-Martial's rejection of religious scruples as a defense to the disobedience of lawful orders. Religion cannot justify a serviceman's becoming "a law unto himself," when allowing him to do so would either

undermine discipline or would make the serviceman unavailable for the performance of militarily necessary duties, either by mere absence or through illness, by the serviceman's refusal to perform his duties, or by his willfully making himself incapable to perform them.

Although the freedom of religion portion of the First Amendment is neither expressly nor by necessary implication excluded from application to the military, it is by necessary implication of <u>limited</u> application. Again, it must be repeated that what causes this necessary implication is the key fact:

In the military, the maintenance of a <u>disciplined</u> and <u>readily-available</u> force of <u>able-bodied</u> men is mandatory.

#### PART IV

#### A SERVICEMAN'S FREEDOM OF EXPRESSION

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### -- The First Amendment

An initial look at the freedom of expression portion of the First Amendment seems to show four distinctly separate parts: freedom of speech, freedom of the press, freedom of assembly, and the freedom to petition the Government. But unfortunately the divisions are not so clear.

Suppose that one evening a serviceman dressed in civilian clothes leaves the military installation to which he is assigned, with proper authority. He joins a local anti-Vietnam war demonstration conducted in the near-by civilian community. He carries a placard mounted on a stick which reads, "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FASCISTS IN 1972" on one side, and "END NIXON'S FASCIST AGGRESSION IN VIETNAM" on the other. What First Amendment rights are involved here? Looking at the fact that the sign contains words which are intended to communicate an idea, free speech is involved. Further, the fact that the words are written (as opposed to being oral) would bring into play freedom of publication (the press). But since the sign was displayed in a peaceful, public demonstration, clearly the right of freedom

of assembly is involved. And, finally, since one of the statements on the sign is an appeal to the Government to end its involvement in Vietnam, the right of petition is involved. Thus freedom of expression is not a separable set of privileges but in fact an interlocking and overlapping complexity. Seen in this light, Professor Thomas I. Emerson's designation of the entirety as "freedom of expression" is much more meaningful.

Notwithstanding, courts and commentators alike have tended to treat freedom of speech and of the press as being based on a common set of logical premises and therefore as issues which result in a common set of legal rules; likewise, freedom of assembly and the right to petition have been treated as another such logical grouping. Reflection indicates that this is sound: There is small difference between written or oral communication; the purpose of both is to communicate. Similarly, there is small difference between a demonstration and a petition; usually the purpose of both is to communicate, publicly, some dissatisfaction which certain individuals have with the Government itself, its policies, or its actions. Since there is a significant difference between free speech (either oral or written) on the one hand, and demonstrations and petitions on the other, for the sake of convenience the ensuing discussion will be divided into the two broad categories of a serviceman's right to free speech, and his right to assembly and petition.

Before proceeding, it should be stressed that a serviceman is not completely outside the "mainstream" of American life, just because he is a serviceman. He, too, is a Federal government employee. He still must pay his income tax. When he appears in a civilian criminal court, his military status neither affords him any legal benefit nor deprives him of any legal privilege. 414 Although there are some special rules relative to him and the civil law, 415 and although he might be considered a special kind of Government employee, and although he is subject to the Uniform Code of Military Justice, it might be instructive to consider whether there are any general principles applicable to any Federal Government employee's freedom of expression will assist in clarifying the issues, although some different results are bound to occur because of the inherent differences in the nature of military and civilian Government employment.

In his discussion of a civilian Government employee's right to freedom of expression, 416 Mr. Emerson in his book

The System of Freedom of Expression first excludes from First

Amendment protection that conduct which could be classified as "action" rather than "expression." Concerning expression,

<sup>414</sup>United States v. Miller, 264 F.2d 216 (D.Del. 1966).

<sup>415</sup>Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. §§ 501-590 (1970).

<sup>416</sup> Emerson at Ch. XV.

he concludes that the mere fact that one is a Government employee should make no difference concerning that individual's right to freedom of expression. However, once having established that Government employees are not "outside" the First Amendment's protections simply because they are Government employees, Mr. Emerson recognizes that a Government employee's right to freedom of expression might not be as completely unfettered as a non-Government employee's right. He frames the problem in this fashion:

We may start with the proposition that in general the government employee is entitled to the same right of expression as the ordinary citizen. There are some points, however, where the expectation of the employee in assuming the job and the common understanding of the obligation necessarily imposed on him to maintain an effective government service allow for exceptions to the general rule that would not be considered "abridgements" of the basic right. These points are determined by the fact that the individual has entered into an "employment relation" with the government. The question is what features of the employment relation demand different rules for the government employee than for others . . .

Upon analysis the crucial factors seem to be that (1) the individual is employed to do a particular job in a particular way, as determined by his superiors; and (2) he is a member of an organization, also with a particular job to do. The first feature requires that the employee be competent and render obedience to orders. The second implies a relationship to supervisors, fellow workers, and inferiors that will permit effective operation of the organization as a whole. It is only upon the basis of factors relevant to these considerations that limitations upon the expression of government employees can be justified as not amounting to an "abridgement." 417

<sup>417</sup> Emerson at 566, 567.

Based on these considerations, Mr. Emerson turns his attention to a Government employee's general right to freedom of expression. He concludes that when the expression is not "job-connected," the Government employee should be treated no different from anybody else, with certain limited and minor exceptions which would reflect on the character and integrity of the employee and therefore on his general competency. An example would be a deliberate falsehood not connected with the job.

When, however, the expression is "job-connected," a different result ensues. First, if the expression is made within the internal organizational framework of the Government employment concerned, while freedom of expression still exists, Mr. Emerson concludes that those restrictions on the employee's right to absolute freedom of expression which are fairly categorized as "management controls" are not an unconstitutional "abridgement" of the employee's right to freedom of expression. Such management controls concern obedience to orders and the maintenance of internal harmony. Second, if the expression is job-connected but is made outside the organizational framework of the employment concerned, Mr. Emerson concludes that some further restrictions are constitutionally permissible, but only

<sup>418</sup> Mr. Emerson also specifically discusses First Amendment problems with the controls over political activities of Government employees, in addition to their general rights to freedom of expression. His comments in that area will be discussed in a separate section infra at pp. 424-444.

to the extent that they directly relate to restricting expression which is "incompatible with the employment relation" or with the individual's "commitments as an employee." To Mr. Emerson, this incompatibility would have to show directly that the employee would either refuse to obey orders or be incompetent to do his job. Specifically, based on the Supreme Court's ruling in <u>Pickering v. Board of Education</u>, Mr. Emerson concludes that merely critical—even sharply critical—statements by a Government employee do not reflect that kind of incompatibility with Government employment which would justify restricting the employee's freedom of expression, especially when the criticism is "substantially correct."

An "old-time" view of military life is that a serviceman is "on duty 24 hours a day," implying that military status
constitutes a total existence. If true, this would mean that
a serviceman would have virtually nothing that was "private"
in his life, especially in the sense that everything would be
more or less job-connected. However much one may debate all
the legal ramifications of the Supreme Court's decision in
O'Callahan v. Parker, 420 at least it can be said with certainty that the decision rejected the notion that the mere status
of being a serviceman was alone sufficient to warrant the ex-

<sup>419&</sup>lt;sub>391</sub> U.S. 563 (1968).

<sup>420&</sup>lt;sub>395</sub> U.S. 258 (1969).

ercise of court-martial jurisdiction over servicemen under all circumstances. In other words, not everything the serviceman does is (in O'Callahan's language) "service connected"—or in the language used herein, job-connected.

Notwithstanding, as experience with O'Callahan itself has demonstrated most clearly, drawing the line between what is job-connected and what is not is not at all easy. And it is even difficult in situations which are entirely within the military context. Two Court of Military Appeals cases will serve to illustrate the point.

In <u>United States v. Noregia</u>, <sup>422</sup> Noregia's unit commander (a lieutenant) decided that a unit party would be good for the unit's morale. Both officers and enlisted personnel attended. The lieutenant even stripped to the waist and acted as bartender for the affair. During the course of the evening, and after drinking not a few bottles of beer pressed on him by the lieutenant-cum-bartender, Noregia (an enlisted man) invited the lieutenant out to fight. In general, the Court of Military Appeals has ruled in other cases that offers to fight superiors are per se disrespectful. <sup>423</sup> However, in the <u>Noregia</u> case, the court ruled that the lieutenant had stripped himself

<sup>421</sup> See Relford v. Commandant, United States Disciplinary Barracks, 401 U.S. 355 (1971), and cases and article references cited therein.

<sup>4227</sup> U.S.C.M.A. 196, 21 C.M.R. 322 (1956).

<sup>4232</sup> U.S.C.M.A. 88, 6 C.M.R. 88 (1952).

of his rank when he stripped his clothing to the waist, and that the lieutenant was no longer entitled to the respect to which his rank would normally entitle him. Thus there could be no offense of disrespect by Noregia. What this means is that the lieutenant was acting <u>privately</u>, since it is clear that by merely taking off his shirt he did not in any way change his status as a lieutenant in the military service.

In contrast, a military intermediate appellate court reached a puzzling contrary decision in United States v. Montgomery. 424 Montgomery was a lieutenant. He got involved in a poker game in a private room at the officers' club. The other players were also officers, one of them being a major. The liquor flowed, but the cards did not apparently flow so freely--at least towards Montgomery; tempers flared, and Montgomery said some not very nice things to the major, threw a coat at him, etc. He was convicted of being disrespectful to a superior officer. This time the court upheld the conviction on the theory that a poker game with other officers was not "private enough" to eradicate the superior-subordinate relationship. Although the court ruled that some obvious latitude in conduct would be permitted by the circumstances (a poker game), the latitude did not go far enough to allow Montgomery to act as he did with impunity.

<sup>42411</sup> C.M.R. 308 (CM 363653), pet. denied, 3 U.S.C.M.A. 826, 12 C.M.R. 204 (1953).

Some obvious differences could be pointed out between the two cases. Noregia was an enlisted man and Montgomery was an officer; and it is a simple but true fact that the military in general, and even the Court of Military Appeals, holds officers to a higher standard of conduct than enlisted personnel. Had Montgomery been an enlisted man playing poker with officers, and had he done the same things, possibly he would not even have been brought to trial. Notwithstanding any distinctions which one might make, the two cases do show that in some situations within the military context itself, a serviceman can act in a private capacity.

Moreover, in 1970 the Court of Military Appeals said the following:

Servicemen, like civilians, are entitled to the constitutional right of free speech. 425
The right to believe in a particular faith or philosophy and the right to express one's opinions or to complain about real or imaginary wrongs are legitimate activities in the military community as they are in the civilian community. If the statements and intent of the accused, as established by the evidence, constitute no more than commentary as to the tenets of his faith or declarations of private opinion as to the social and political state of the United States, he is guilty of no crime. 426

If, then, servicemen are free to communicate their personal, private opinions, could they give their private opinion about

<sup>425</sup> United States v. Gray, 20 U.S.C.M.A. 63, 66; 42 C.M.R. 255, 258 (1970).

<sup>426</sup> United States v. Daniels, 19 U.S.C.M.A. 529, 532; 42 C.M.R. 131, 134 (1970).

any other individual, especially a derogatory opinion, and especially if the other individual were their military superior? No; the freedom does not extend that far. "Disrespect" towards superiors is prohibited, as will be discussed below. However, it is interesting to note that in the two disrespect situations in the Uniform Code of Military Justice where there is no requirement that the disrespect be communicated in the physical presence of the superior, 427 there is language in the Manual for Courts-Martial in discussing each situation 428 specifically excluding expressions made "in a purely private conversation." However, it is evident from the Montgomery case discussed above that what is "purely private" within the military is probably vastly different from what is so in civilian life. Thus each situation must be tested on its own facts.

If any guidelines can be derived from all this, perhaps the line could be drawn between that conduct which is normally and traditionally considered "military" and therefore job-connected (relations with superior military officers, like Montgomery's poker game), and that which is normally and traditionally considered to be "civilian" (discussion of one's religious beliefs, and a private discussion of the social and political state of the United States, to include the President).

But the imprecision of these lines must be stressed:

<sup>427</sup>U.C.M.J., Arts. 88, 89.

<sup>428&</sup>lt;sub>M.C.M.</sub>, paras. 167, 168.

For example, the President is the Commander-in-Chief of the Armed Forces. In that role, he is without question the military "superior" of every serviceman. When, then, are comments about the President job-connected and when are they not, if ever? Further, it must be stressed that no court, military or civilian, has ever articulated a line such as this. However, for analytical purposes herein, perhaps this is the best--and maybe the only-rational means which can be used to divide those aspects of a serviceman's life which will be treated like similar aspects of a civilian's life, and those which will be treated differently because they are military. Hence it will perhaps be helpful to keep in mind those differences as the specifics involved in a serviceman's right to freedom of expression are considered.

One final point concerning the serviceman as a civilian must be stressed by way of introduction. Article 134 of the Uniform Code gives courts-martial jurisdiction over all "crimes and offenses not capital." This means that courts-martial may take jurisdiction over any Federal offense of unlimited geographical application, if the serviceman committed the offense within those geographical boundaries. Thus the Uniform Code

<sup>429</sup> See supra, n. 420. O'Callahan limited the jurisdiction of courts-martial to offenses which are "service-connected." Thus court-martial jurisdiction over an offense assimilated into the U.C.M.J. through Art. 134 would have to meet that test before jurisdiction would attach.

itself reflects the principle that a serviceman is still subject to the civilian law, albeit that the law may be enforced through the military judicial system. And of course the serviceman is subject to the full impact of the civilian law in the civilian courts themselves -- except to the extent that the Soldiers' and Sailors' Civil Relief Act430 affords him protection in certain civil cases. But in general, it is fair to say that a serviceman may possibly be doubly restricted in his right to full exercise of his freedom of expression: First he is subject to most all restrictions to which any other citizen is subject; and second, because of his military status, he may possibly be subject to additional restrictions. Again, except to the extent that the Soldiers' and Sailors' Civil Relief Act applies -- and its application to many cases involving the First Amendment is doubtful, if not virtually impossible -- it must be made clear that a serviceman is not relieved of any legal restrictions imposed on civilians in general in relation to the First Amendment, simply because he is a serviceman.

With these considerations in mind, let us now turn to a consideration of the specifics involved. As previously stated, the discussion will be divided into two broad categories: first, the area of free speech; and second, the area of the right to assembly and petition. The limitations on a

<sup>430</sup> See supra, n. 415.

serviceman's political activities will be discussed separately after both the other topics, since those activities cut across both aspects of a serviceman's right to freedom of expression. Finally, in another separate section (Part V), mention will be made of certain administrative controls which can be exercised over freedom of expression, and which the courts have been reluctant to review with a view to supervising the military, thereby leaving the military with wide latitude and discretion in certain contexts.

# A. A Serviceman's Right to Free Speech

Just as the Supreme Court never acceded to Justice Black's absolutist view of the First Amendment, neither has the Court of Military Appeals ever held the First Amendment to be an absolute. Thus, whether discussing the First Amendment in either the civilian or military context, the real issue is, what <u>restrictions</u> may lawfully be imposed on the full exercise of one's right to free speech?

Before turning to this question, a general comment is required concerning the free speech aspects of the military law of attempts, conspiracy, and solicitation. In his book The System of Freedom of Expression, Mr. Emerson devotes an entire chapter 431 to these crimes, which he designates as "inchoate" crimes. His thesis is that when these crimes can

<sup>431</sup> Emerson at Ch. XI.

be committed purely by expression, with no action ensuing, a conviction for committing one of them violates First Amendment guarantees. Since a number of offenses proscribed by the Uniform Code of Military Justice, or assimilated into it through the operation of Article 134 (as noted earlier), will be mentioned in the ensuing discussion, and since the Uniform Code contains proscriptions against attempts, conspiracy, and solicitation, a few remarks concerning these offenses are in order. Specifically, the question is, are there any First Amendment difficulties with these offenses in military law?

The answer to this question is negative, with respect to the law of attempts and conspiracy. This is because the Uniform Code in each case requires proof of an overt act:

Art. 80. Attempts

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

Art. 81. Conspiracy

Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial shall direct.

Of course it is possible in each of the offenses stated above that the "act" could be one only of expression, if the offense in question either attempted or conspired to be committed involved prohibited expression. For example, Article 88 of the Uniform Code prohibits officers from using "contemptuous" language against (among others) the President. If

an officer were to prepare placards to be carried in a public demonstration, containing language which was contemptuous to the President, but if he were stopped before he actually paraded with them, his activities would possibly be an "attempt" to be publicly contemptuous to the President. If two or more officers planned the same thing, and did everything the first officer did, conceivably they could be charged with a conspiracy to violate Article 88. However, the constitutional difficulty--if any--in such cases does not truly lie in the issues involved in the law of attempts or the law of conspiracy; rather, the true First Amendment problem lies in the issues involved in the <u>basic</u> offense--in the example, Article 88 of the Uniform Code. If that offense is a permissible constitutional limitation on an officer's freedom of expression, then a conviction of either an attempt or conspiracy to commit the offense would likewise be constitutionally permissible. But if the offense in question were not one which could be committed, consistent with the First Amendment, only by expression--that is, if it were one which would be committed by action -- then Articles 80 and 81 would require proof of an act for conviction. Thus there is no First Amendment difficulty with these offenses themselves, as they exist in military law.

The law of solicitation is another matter. Article 82 of the Uniform Code establishes the crime of solicitation as "soliciting or advising" a serviceman to commit any one of the

four offenses of desertion, mutiny, misbehavior before the enemy, or military sedition, as those offenses are proscribed by the Uniform Code in Articles 85, 94(a)(1), 99, and 94(a)(2), respectively. However, the discussion of Article 82 in the Manual for Courts-Martial 432 authorizes prosecution for the solicitation of any other offense within the Uniform Code as a violation of Article 134. Thus, either under Article 82 or Article 134, a serviceman may unlawfully solicit or advise another to commit any offense proscribed by the Code. Further, there is no doubt that the solicitation may be purely by expression, and that there is no requirement that the crime solicited be committed or even attempted; as the Manual discussion phrases it, "A solicitation in violation of this article is complete when a solicitation is made or advice is given with the wrongful intent to influence another or others to commit" 433 an offense.

Mr. Emerson opines that solicitation offenses are unconstitutional, unless in the specific case in question the solicitation "is so close, direct, effective, and instantaneous in its impact that it is part of the action. The speaker must, in effect, be an agent in the action." Under military law, if this were so, the speaker would no longer be a solicitor

<sup>432</sup>M.C.M. at para. 162.

<sup>433</sup> Id.

<sup>434</sup> Emerson at 404.

but a principal; Article 77 of the Code defines a principal not only as one who actually commits the offense but also as one who "aids, abets, counsels, commands, or procures" the commission of an offense, or one who "causes an act to be done which if directly performed by him would be" a crime. Therefore there is no difference between "counselling," "procuring," or "causing" an offense on the one hand, and in "soliciting or advising" its commission on the other, if in each instance the actual offense in question is either attempted or actually committed. Why, then, have the solicitation offense at all?

The real difference is that in order to be charged as a principal under Article 77, the offense must indeed be actually attempted or committed, while the offense of solicitation can be charged even when there is no attempt or actual commission of the offense solicited. This is the real difference between the two. But does that difference make conviction of the crime of military solicitation violate the First Amendment?

w. Regents of the University of the State of New York 435 as the only decision of the Supreme Court which has directly dealt with the First Amendment in a context analogous to the offense of criminal solicitation. There the Court applied an

<sup>435&</sup>lt;sub>360</sub> U.S. 684 (1959).

incitement test and ruled that punishment of mere advocacy falling short of incitement would infringe on First Amendment rights. The converse would be that incitement to commit an offense would be constitutionally punishable where the offense was actually committed or even attempted. Using this test, then, if the "solicitation or advice" were sufficiently strong to equal an incitement to commit the offense, then punishment under either Article 82 or Article 134, as appropriate, would be constitutionally permissible. But if the speech were mere "advocacy of ideas," not amounting to an incitement, then punishment for "soliciting" the offense would be invalid.

With these general comments in mind, let us now turn to a discussion of the constitutionality of various restraints on a serviceman's right to free speech. While the discussion could perhaps proceed only by analyzing the applicable cases, the area is so complex and so many considerations must enter into the determination of what restrictions may properly be imposed, that it will perhaps be more clear to approach the problem from a functional viewpoint. First will be considered the issue of national security, in two aspects: external security, meaning security from foreign invasion; and internal security, meaning security from internal overthrow of the Government, or even an internal take-over of the Government by extra-legal means. Next will be discussed those restrictions

imposed in the name of good military order and discipline, a concept similar to civilian "law and order" but much broader in the military context. Also, the concept of military good order and discipline will include the concept of morale. The topics will be discussed seriatim.

### 1. External Security

It is most interesting to note that it was not until 1919, at the end of World War I, in a series of cases dealing with national security legislation enacted by Congress as result of the War, that the Supreme Court really began the development of First Amendment legal doctrine. In those initial cases, national security, virtually without question, formed the basis for restricting the full exercise of free speech. 436

However, in the summer of 1971 the Supreme Court again had occasion to consider the issue of a restriction on free speech based on a Government claim of national security, in New York Times v. United States. 437 The issue in that case was whether the United States would be given an injunction prohibiting the New York Times and the Washington Post from printing the content of certain classified documents which collectively have acquired the name of "The Pentagon Papers."

<sup>436&</sup>lt;u>See</u> Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

<sup>437&</sup>lt;sub>403</sub> U.S. 713 (1971).

The Supreme Court refused to grant the injunction. However simple this result may seem, the reasoning behind the Court's decision, especially as it touches on the issue of national security, is exceedingly complex.

First, the Court issued a <u>per curiam</u> opinion. In essence, it said that the requested injunction would amount to an unconstitutional prior restraint on free speech were it to be granted; and that if the Government wished to impose such a restraint on the press, it had a heavy burden to meet to prove that the national security would in fact be harmed—and that it had not met that burden. A thread running through the entire decision—including the separate opinions of each of the nine Justices—is that there was no Act of Congress applicable to the case at hand and, therefore, the Court would be "making law" were it to grant the Government's request for the issuance of an injunction.

However, from each of the Justices' separate opinions a great amount can be gleaned concerning their view of the role which national security can play in the area of freedom of expression. Only Justice Black, applying his absolutist view, held that national security would never be a valid reason to limit the right of free speech. Justice Douglas agreed, except that in time of war he would allow some restrictions. 439

<sup>438</sup> Id. at 718, 719.

<sup>439&</sup>lt;sub>Id</sub>. at 723.

The other Justices all appeared to believe that time of war is not the only time when national security would justify valid restrictions on the full exercise of free speech. Indeed, Justice White stated that he would have "no difficulty" in sustaining an appropriate conviction in the case at bar, if there were a law which could be cited to have been violated. 440 The Chief Justice and Justice Blackmun specifically stated that they joined Justice White's opinion in this regard, and Justices Brennan, Stewart, and Marshall in their own opinions appeared to agree (without specifically saying so). Excluding Justices Black's and Harlan's opinions due to their subsequent deaths, and excluding Justice Douglas since he believed security restrictions valid only in time of war, there still remains a clear majority of six Justices who indicated that, under appropriate circumstances, national security--even in time of peace--may form a valid basis for restricting the full exercise of one's right to free speech.

There is another critical consideration involved in the New York Times v. United States case. Even if national security may form a valid basis for restricting the full exercise of free speech, may those restrictions be imposed prior to speech, or may they be imposed only in the form of punishment for a violation of certain prohibitions which the legislature imposes in the interests of national security? From

<sup>440</sup> Id. at 737.

another viewpoint, the issue is whether "security violations" will be prevented before they occur, or whether they only will be punished if they do occur. The argument is always made that the national interest may be so harmed by the mere disclosure of the information that punishment after the fact is irrelevant; thus the argument runs for prevention. But would that be an unconstitutional prior restraint on speech?

Again turning to the opinions of the Justices in the case, approximately the same split occurs. Justice Black believed any kind of restraint was prohibited, and indeed any punishment as well. Justice Douglas believed that restraints could exist only in time of war, but that they could be "prior" restraints. He cited Near v. Minnesota on that point. The other Justices seemed to be saying that if Congress passed a law establishing certain prior restraints in the interests of national security, and if the matter in question could actually be proved to harm national security if disclosed, they might grant an injunction.

It is interesting to note that 17 years earlier, in 1954, the Court of Military Appeals considered the conviction of an Army officer for violating a regulation which, in effect, imposed a prior restraint on speech and publication for security purposes; and, like the 1971 New York Times case, the Court of

<sup>441</sup> Id. at 718, 719.

<sup>442283</sup> U.S. 697 (1931).

Military Appeals produced a similar split of opinion on the issue. Chief Judge Quinn wrote:

[T]here are differences between the civilian and the military communities. In the military sphere, punishment for violation of law is not always an adequate protection against an abuse of a Constitutional privilege; then prevention rather than punishment becomes imperative. The line of reasoning delineated in cases like Near v. Minnesota ex rel. Olson, 283 U.S. 697, cited approvingly by Judge Brosman in his dissent, is workable, and perhaps even highly desirable, in the civilian community. However, it hardly serves a useful purpose, in the instant case, where one false move could be extremely dangerous, and one false word could be disastrous, or even fatal. Prevention rather than punishment becomes necessary to protect and preserve the lifeline of the republic in the theatre of military operations. It is that problem which confronts us here. And it is that difference which makes it reasonable to impose security measures on the publication and disclosure to unauthorized persons, rather than to rely on punishment for a consummated abuse of a Constitutional privilege.443

In the same case, Judge Latimer wrote:

Undoubtedly we should not deny to servicemen any right that can be given reasonably. But in measuring reasonableness, we should bear in mind that military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully. That purpose must never be overlooked in weighing the conflicting interests between the right of the serviceman to express his views on any subject at any time and the right of the Government to prepare and pursue a war to a successful conclusion. 444

It may be helpful at this point to add an observation

<sup>443</sup>United States v. Voorhees, 4 U.S.C.M.A. 509, 531; 16 C.M.R. 83, 105 (1954) (italics in original).

<sup>444</sup> Id.

which may not be immediately apparent: Every day is a "time of war" to the military. It must be so. If national defense is to be effective, every day must be assumed possibly to be the day of war. No other assumption has any validity whatsoever, if preparedness for defense is the goal. Thus even though the republic is not at war, the military must assume that it might be--momentarily. Accordingly, every serviceman lives in a kind of perpetual "time of war." And consequently those restrictions which might be imposed even on civilians with justification during a time of war are appropriately imposed on servicemen at all times. If Justice Douglas were to accept this line of reasoning as applied to servicemen, even he would join the other six Justices and agree that national security considerations may indeed form a basis for prior restraints on a serviceman's right to the full exercise of his right to free speech. Additionally, even with a change of judges on the Court of Military Appeals, there is nothing to indicate that that court would take a different view from the one indicated by the 1954 majority opinions quoted above. Thus it appears that all the courts concerned would allow prior restraints on a serviceman's speech, in the interests of national security.

With these general observations in mind, let us proceed to a consideration of some of the areas where national security has been invoked as a restriction on a serviceman's conduct.

#### a. Treason and Espionage

While one does not normally think of treason and espionage as involving the First Amendment, reflection will indicate that it is clearly possible to do either of these things by communication alone. Further, servicemen-because of their intimate connection with classified defense material—are in much more a prime position to commit espionage (and perhaps even treason) than most. Do these offenses, however, fall within the protections of the First Amendment, since they involve communication?

The Constitution itself in Article III, § 3, clause 1, requires "two Witnesses to the same overt Act," or the accused's confession in open court as proof of treason. Thus treason requires an <u>act</u> to be committed. Does this mean that, applying the expression-action test, treason is not within the First Amendment's protection? But if the treasonable act were alleged to be the communication of classified defense information, what result then? To call such a communication "action" would require a determination that the communication in question was <u>not</u> "expression." The same would be true of espionage. 445

Is such a determination reasonable?

Mr. Emerson delineates the problem this way:

It is true that . . . the communication of information . . . by itself would normally be considered "expression." But espionage does take place in a context

<sup>445&</sup>lt;sub>18</sub> U.S.C. §§ 794, 798 (1970).

of action; the espionage apparatus is engaged primarily in conduct that dwarfs any element of expression. Essentially, espionage is analogous to stealing. Moreover, espionage cannot be considered expression within the protection of the First Amendment for another reason. Most espionage consists of conveying information concerning military secrets and would fall within the system of military operations. And all espionage involves aiding a foreign country and that would be subject to governmental control as part of the power to regulate relations with another sovereign . . . . Hence even if espionage were considered "expression," it is not that form of domestic, civilian expression that is embraced within the system of freedom of expression. 446

The Supreme Court has concurred in an "action" theory of the law of treason. 447 Further, the only article of the Uniform Code of Military Justice applicable to this type of conduct is Article 106, entitled "Spies." It too requires action, as it states that the offense is committed by being "found lurking as a spy or acting as a spy." Thus it may be concluded that treason and espionage, if committed by a serviceman—or anyone else, for that matter—are not protected by the First Amendment, even if committed by purely "verbal acts."

### b. Communications with Foreigners

Generally speaking, the First Amendment protects any communication in a purely private capacity, with foreigners as individuals, or with a foreign government. 448 Naturally if

<sup>446</sup> Emerson at 58, 59.

<sup>447</sup>Cramer v. United States, 325 U.S. 1 (1945).

<sup>448</sup> Emerson at 93-95.

the communications in question become treasonable, or amount to espionage, they are not protected, as discussed immediately above. But in general, such communications are not different from a communication between any two individuals, or between an individual and his State or the Federal Government. Further, it would appear that these principles would apply in time of either peace or war.

Nonetheless, the Uniform Code of Military Justice prohibits certain communications by servicemen with foreigners in time of war when these foreigners become "enemies."

The first of these prohibitions is Article 101, which prohibits disclosing the "parole or countersign" to one not entitled to receive it. Paragraph 180a of the Manual for Courts-Martial defines these words as follows:

A countersign is a word given from the principal headquarters of a command to aid guards and sentinels in their security of persons who apply to pass the lines. It consists of a secret challenge and a password. A parole is a word used as a check on the countersign; it is imparted only to those who are entitled to inspect guards and to commanders of guards.

Thus it is apparent that the parole and the countersign are not intended to communicate. Rather, they act as identification in time of war for distinctly military operational purposes, the security of military lines. In this sense, they clearly do not fall within the kind of expression protected by the First Amendment and the unauthorized communication of them is therefore constitutionally punishable.

The second article of the Code is Article 104, "Aiding the Enemy." Section (2) of that article prohibits giving any "intelligence" to the enemy. Clearly this is not protected by the First Amendment, since it is tantamount to espionage. However, the same subsection of the article also says that anyone who "without proper authority knowingly . . . communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly" is also guilty of the offense of aiding the enemy. This poses a more difficult problem. Especially is this so since the Court of Military Appeals has held that there is no specific intent required for the commission of this subsection of the offense, so long as the accused knew that the person with whom he communicated was indeed a member of the enemy group (civilian or military). 449 Further, the court has ruled that the prohibitions on communication are absolute, 450 except as authorized by the Geneva Conventions.451

Most of the instances in which this offense has been charged arose out of the conduct of Americans taken as prisoners of war during the Korean War. In reality, what the prisoners in question did was to aid their captors' propaganda effort by making propaganda speeches. Noting that the offense under Article 104 is punishable by death, the Court of

<sup>449</sup>United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

<sup>450</sup> United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957).

<sup>451</sup> United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).

Military Appeals said in one case that "[S]urely an offense which is so closely akin to treason and may be punished by death cannot be viewed as a 'public welfare' kind of dereliction." To this extent at least, the cases are very close to the treason offense which was sustained in the civilian case of <u>Gillars v. United States</u>. Gillars (alias "Tokyo Rose") had made propaganda radio broadcasts from enemy territory, directed against American morale in the field.

However, a more difficult problem would be posed where a serviceman has relatives in enemy territory and he merely writes a personal letter to them. Article 104 would proscribe that correspondence and authorize a death penalty to be imposed upon conviction—the same as for other communications which actually assisted the enemy's propaganda efforts. The Court of Military Appeals has not considered a case like that just hypothetically posed; however, in deciding the Korean War cases, the court noted that the Articles of War have continuously, from 1776 to the present, contained these prohibitions. Further, the court noted that the prohibitions have

<sup>452</sup> United States v. Batchelor, 7 U.S.C.M.A. 354, 367; 22 C.M.R. 144, 157 (1956).

<sup>453&</sup>lt;sub>182</sub> F.2d 962 (D.C. Cir. 1950).

<sup>454</sup> See also D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); Best v. United States, 184 F.2d 131 (1st Cir. 1950), cert. denied, 340 U.S. 939 (1951); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949).

continuously been interpreted by the military (mainly in the Manual for Courts-Martial) to be <u>absolute</u> prohibitions. 455

Thus it would appear that the court would sustain a conviction against a serviceman who wrote a personal letter to enemy relatives, the same as in a case where an American prisoner of war had aided his captors' propaganda efforts.

Would that be consistent with the First Amendment?

Here again must be considered the pervasiveness of military life. When one writes a personal letter, one tends to talk about current events in his life. If one is a service-man, these current events are his unit, his commanders, his friends (mostly other servicemen) and his occupation (his military duties). All of these have military significance. They, with other bits and pieces of information, could be put together by enemy military experts to form "military intelligence." Even the serviceman's return address on the envelope could give information concerning his unit and particularly its whereabouts. Thus the national security interests concerned justify this restriction on a serviceman's completely free right to speech and communication.

<sup>4557</sup> U.S.C.M.A. at 368, 22 C.M.R. at 158.

A56The censorship aspects here involved will be dis-

# c. The Military Security System

By authority of 18 U.S.C. \$ 798 (1970) and 50 U.S.C. \$\$ 783, 784 (1970), as implemented by Executive Order No. 10501,457 the President is authorized to restrict access to defense information by establishing a classification system "in the interests of national security." Herein arises the scheme of "confidential," "secret," and "top secret" security classifications, plus some other rare ones such as "cryptological" which further limit access to information otherwise available to those with the appropriate security "clearance." And, of course, the entire authority to classify carries with it as a necessary adjunct the power to grant or deny to individuals security "clearances" -- meaning that the individual concerned may see classified defense information only up to and including the level of "clearance" which he possesses. The military has implemented this system with elaborate regulations.

Because of the regulatory implementation in this area, mention must be made of the content of Article 92(1) of the Uniform Code of Military Justice. That article makes criminal the violation (either in the sense of an act of commission or an act of omission) of any provision of any lawful general regulation. A "lawful general regulation" is defined by paragraph 171a of the Manual for Courts-Martial

<sup>4573</sup> C.F.R. 115 (1953 Supp.).

as those

generally applicable to an armed force which are properly published by the President or by the Secretary of Defense, of Transportation, or of a military department, and those . . . regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by an officer having general court-martial jurisdiction, a general or flag officer in command, or a commander superior to one of these . . . . A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it . . . Article 92(1) contains no requirement that any kind of knowledge be either alleged or proved in a prosecution thereunder for violating or failing to obey a general . . . regulation.

This provision, coupled with the contents of the referenced security regulations concerned, obviously allows criminal punishment for the violation of any of the security requirements imposed by the regulations in question.

Suppose that a serviceman is charged under Article 92(1) with violating a particular security regulation by discussing classified defense information with his wife and a group of friends at a cocktail party; or that he wrote a letter to a friend wherein he discussed certain classified defense information. Clearly a First Amendment problem is presented. 458

<sup>458</sup> It should be noted that if the alleged charge were a physical act, no First Amendment problem would arise. Examples would be that the individual, having physical possession of a classified document, lost it, was careless in the way he safe-guarded it so that persons without an appropriate security clearance or the need to know saw its contents, and other similar acts. Thus the discussion will limit itself only to that conduct which could be classified as "expression," rather than that which is clearly "action."

As a matter for initial consideration, it would seem that an individual charged with any kind of a "security violation" (as they are usually termed in the military) should be able to challenge the propriety of the security classification itself. The reasoning would be that the classification given to the information may be placed thereon only as authorized by the regulations, Executive Order, and statutes in question. If the classification were improper, there would be no "security violation" by the individual. Interestingly enough, the Supreme Court touched on this problem in its 1971 decision in New York Times v. United States. 459 There the problem concerning publication of "The Pentagon Papers" would have been obviated if the security classifications on the documents were removed, or if it were determined that they had been improperly placed thereon initially. This caused the Court to comment on the validity of the security classifications themselves.

Justice Stewart seemed to give the Executive rather broad powers in this area. If so, since the Executive has delegated those powers to his military subordinates, they have broad powers as well. Justice Stewart wrote:

If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have

<sup>459</sup> See supra, n. 437.

the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. 460

In contrast, the late Justice Harlan (dissenting) said that the civilian courts do and should have the power to review security classifications imposed by the Executive or his subordinates. However, Justice Harlan would have limited that review quite narrowly to two areas: (1) to determine whether the classified information did in fact lie within the proper Executive sphere of foreign relations or the national defense; and (2) to insist that the fact of classification itself (and its level) be affirmed personally by the head of the Executive agency concerned. As to this latter point, Justice Harlan seemed to be analogizing to the concept of Executive immunity; he only wanted to insure that it was indeed the Executive himself or his highest subordinate concerned who made the claim that a particular security classification was required in the interests of foreign affairs or national defense.

The two views could be summarized as "Executive responsibility" (Stewart) and "limited judicial review" (Harlan). Clearly if the first were accepted by a majority of the Court, judicial review of the necessity for the security classification itself would be virtually nullified. Under the limited judicial review position, obviously there would be the possibility

<sup>460&</sup>lt;sub>403</sub> U.S. at 728, 729.

<sup>461</sup> Id. at 752-759.

for a challenge of the security classification itself. As both of these views are reasonable and have firm traditional roots, it is difficult to predict which will prevail. However, to give the broadest scope possible to an individual's First Amendment rights, there ought to be a way to challenge the security classification itself. Whether that will come to pass remains to be seen; however, it must be emphasized that research has failed to reveal any case where such a review has been undertaken by any court.

Turning from the security classification review problem, let us consider another problem mentioned briefly above as a necessary adjunct to the existence of a security classification system, namely, the problem of issuing security "clear-ances." While not readily apparent, this is indeed a problem of moment.

If the business of national defense imposes a need for secrecy—which it clearly does—then certain job positions would be granted only to those who possess the requisite level of security clearance for the job in question. Conversely, if one who held one of those positions lost his security clearance, he could no longer hold the job. Since promotion depends in part on the job held and the military occupational specialty required, loss of a security clearance could have severe consequences. For enlisted personnel, it would not require their elimination from the military; it would, however, require their

transfer to another job, and it would probably kill any career aspirations which the enlisted man had. For officers, however, the problem is more severe, since no one may hold a commission in the Armed Forces unless he possesses a security clearance. The officer is not required to possess the highest level of clearance (a "top secret" clearance); but he must possess at least the lowest level ("confidential"). If, therefore, an officer loses his security clearance entirely, he must be considered for elimination from the service. For civilian employees of the military, the loss of a security clearance could also cause the loss of their jobs. Thus possessing and keeping a security clearance is a very real problem for one employed by the military.

How, then, does one receive a security clearance? The answer is that the individual "applies." However, the application is not simply a letter requesting the clearance; instead, the individual is also required to complete an extensive personal history statement (Department of Defense Form 638), which is used as the basis for an extensive "background" check, the actual scope being determined the level of clearance requested. Effective 1 April 1972, the Defense Investigative Service will conduct these investigations. Obviously the investigation looks into the opinions, expressions, and associa-

<sup>462</sup>These were the facts in Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961).

tions of individuals, and the Government (the military) uses its findings as a basis for granting or denying the requested level of clearance. Does this system violate the First Amendment? Can the Government grant or deny benefits and potential advancement based on an investigation into one's opinions and associations?

First, it is indisputable that the security clearance system is vitally necessary to the security classification system. There would be no sense in applying security classifications to defense information if anyone could have access to the material. Thus there must be some system to determine who will be allowed that access. Second, the common-sense requirements of the military may constitutionally dictate certain requirements for employment within that organization. In analyzing this problem in the context of loyalty oaths as a basis for granting or denying Government employment to civilians, Mr. Emerson in his book The System of Freedom of Expression writes:

The government is of course entitled to carry on its functions through organizational forms . . . . Inherent in the organizational form are certain requirements essential to effective performance. One is that at times the holding of a specific opinion is an affirmative prerequisite for doing a particular job. In a sense this special viewpoint becomes a bona fide occupational qualification. Recognition of this need does not curtail freedom of expression on the part of others holding different opinions . . .

To take an extreme example, a leading member of the Democratic Party would not feel that his freedom of expression had been infringed if he was passed over, because of his political opinions and associations, for a position in the cabinet of a Republican President . . To give another example, a rabid member of the Ku Klux Klan would hardly expect to be appointed as head of the Civil Rights Commission. Nor would a scientist of unorthodox views feel that his right to dissent was impaired if he was not called in as a consultant on a government project framed on the-

ories not shared by him.

In constitutional terms, all this means that in a limited area, measured by the common-sense requirements of the organization, occupational qualifications for government employment based on opinions or associations do not "abridge" freedom of expression . . . This would exclude from consideration any loyalty qualifications required of military personnel functioning within the armed services. It would also exclude some civilian personnel employed by the military in military operations to the extent that such persons are part of the military system. 463

Having concluded along with Mr. Emerson that neither the military security classification system nor the security clearance system "abridges" one's freedom of expression, let us return briefly to the problem of actual punishments for violating the security system. An actual case in point is <u>United States</u> v. Grow. 464

Major General Grow was the Military Attache at the United States Embassy in Moscow. The General apparently had the habit of keeping a personal diary. However, in it he recorded some highly classified defense material. Later, while he was attending a military attache conference in Wiesbaden, Germany—to which he also took his diary—"persons unknown" stole the diary, photostated its contents, and put it back where they found it.

<sup>463</sup>Emerson at 209, 210.

<sup>4643</sup> U.S.C.M.A. 77, 11 C.M.R. 77 (1953).

The General never knew anything happened, until some American intelligence experts recovered the photostats. The General was prosecuted for violating Article 92(1), both for failing to "classify" his diary in accordance with the pertinent regulations, and for failing to safeguard his diary as classified defense material in accordance with the same regulations. addition, he was also charged with dereliction of duty. 465 He was convicted as charged. The discussion of the case by the Court of Military Appeals did not involve any First Amendment considerations; but that is not surprising, since the case was decided only as the court was making its initial probings into the application of the Bill of Rights as a whole to the military. 466 Moreover, it could be contended that a diary intended to be kept private simply does not raise any First Amendment considerations. On the other hand, regardless of the General's intent, the diary did in fact become public. Therefore, perhaps the General's diary was like Winston Smith's:

Whether he went on with the diary, or whether he did not go on with it, made no difference. The Thought Police would get him just the same. He had committed—would still have committed, even if he had never set pen to paper—the essential crime that contained all others in itself. Thoughtcrime, they called it.467

<sup>465</sup> Prohibited by Art. 92(3), U.C.M.J.

<sup>466</sup> See Part I of this paper, pp. 38-46.

<sup>467</sup>G. Orwell, Nineteen Eighty-Four, Ch. 1, 8 I at 10 (Howe ed. [with sources and criticism] 1963).

From this point of view, notwithstanding the lack of First
Amendment considerations by the Court of Military Appeals,
should the General's diary have been protected by the First
Amendment?

Under almost any theory the answer is negative.

First, common sense would say that there is no reason to have security classifications at all if individuals can disregard them with impunity—or even if they may disregard them whenever they do so in a way that is traditionally "private"—like keeping a diary. Circumstances show—as General Grow could attest—that one's intentions of privacy and the facts are not always the same. Further, as Justice Stewart said in the 1971 New York Times case, "In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident." Even those who would opt for a full-protection theory of the First Amendment would not disagree. 469

second, it is clear that classified defense information is directly related to a serviceman's job. Communicating it to unauthorized persons, even within the job framework (such as to another serviceman who did not have the requisite security clearance), violates the "absolute secrecy" needed for the prop-

<sup>468403</sup> U.S. at 728.

<sup>469</sup>However, Mr. Emerson for one would demand judicial review of the level and fact of the classification itself. See Emerson at 58.

er conduct of the job of national defense. General Grow's concomitant conviction for dereliction of duty indicates the close connection between his employment as a military officer and the security system. Further, it could be arqued that the disclosure of classified defense information is simply not "expression." At best, for a military man, it is an act of carelessness, even though the carelessness may be in the form of writing a letter, writing in one's diary, or in conversation. The phrase "dereliction of duty" is appropriate here, since that is the real nature of the serviceman's act, not "expression." Perhaps security violations committed by purely verbal means could be analogized to stealing--like espionage: To be sure, there is usually no criminal intent involved; but in those cases where a violation does occur, the Government has been deprived of its secret property by the fact that it is no longer secret.

Thus there is no First Amendment problem with a prosecution under Article 92(1) for a violation of security regulations by mishandling or unauthorized disclosure of classified defense information.

## d. Security Censorship

Department of Defense Directive No. 5230.9, dated

24 December 1966, requires the submission to the Department

of Defense Director of Security Review or another designated

subordinate officer, for the purpose of prior clearance, any

book, article, speech, or any communication which will be presented to the public at large by a serviceman. An elaborate "appeal"-review system is also established for cases where disagreement between the individual serviceman and the reviewing official arises. Without question the clear intent of the regulation is to censor the personal opinions of the serviceman concerned to insure that no security violation occurs, prior to the utterance or publication in question. Is this an unconstitutional restraint on speech and publication? In the New York Times v. United States 471 case, the Supreme Court was adamant that any system of prior restraints—at least in relation to the civilian press—required a specific Act of Congress; and further, even if such an act existed, the Government would bear a heavy burden to prove application of the act warranted in specific cases.

However, it must also be remembered that the separate opinions of the Justices all (except that of Justice Black) seemed to indicate that in time of war, certain security restraints are permissible, and necessary. Justice Douglas cited

<sup>470</sup>The directive states that "Although retired personnel and members of the Reserve components not on active duty are not subject to the provisions of this Directive, they may avail themselves of the review service [provided herein] to insure that their proposed information releases do not violate security." DoD Dir. 5230.9, 24 Dec. 1966, para. III.

<sup>471</sup> See supra, n. 437.

Near v. Minnesota<sup>472</sup> as holding that no system of prior restraint may be imposed on the press; yet Justice Brennan, in his separate opinion immediately following that of Justice Douglas, pointed out that Near v. Minnesota itself specifically recognized an exception in time of war.<sup>473</sup> And what is the basis for that exception? National security. The other Justices all seemed to assume that national security interests might conceivably justify such restraint at any time; clearly they all agreed that in time of war, security restraints were constitutional. Indeed, it must be remembered that during World War II, there was the Office of Censorship.<sup>474</sup>

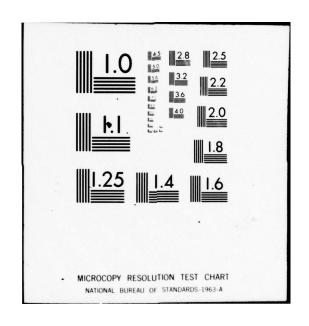
As mentioned earlier, it must also be remembered that the serviceman exists in a kind of continual "time of war." He may have access to classified material at all times. He may know so much classified information that it becomes rather commonplace to him. Just as his military environment is somewhat "total," it is possible that a large percentage of his thinking may involve classified information. Consequently, through inadvertence, he might easily disclose at the cocktail party, or to the public at large if he published a writ-

<sup>472</sup> See supra, n. 442.

<sup>473&</sup>lt;sub>403</sub> U.S. at 726.

<sup>474</sup>The World War II Office of Censorship was established by Exec. Order No. 8985, 6-248 Fed. Reg. 6625 (23 Dec. 1941). See Price, Government Censorship in Wartime, 36 Am. Polit. Sci. Rev. 837 (1942).

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ing or made a speech, classified information. It is for these reasons that the censorship requirements are imposed on servicemen at all times. Thus even if civilian censorship is justified only in actual time of war, the military situation demands censorship for security reasons at all times.

This was the opinion of the Court of Military Appeals in 1954 in United States v. Voorhees. Lieutenant Colonel Voorhees had written a book on the Korean War. He submitted it for review in accordance with the then-current Army regulation, but he refused to make certain changes which were directed by the reviewers. The book was published without final approval by the Army. He also submitted to Argosy magazine a modified version of a part of the book, in addition to two articles to the New York Journal-Courier; but he submitted both the Argosy material and the newspaper material to the publishers prior to submitting it to the Army for clearance. These facts resulted in a number of charges which were brought to trial; of them all, only one involving the Argosy magazine affair withstood judicial review and reached the Court of Military Appeals. The court reversed on a technical point concerning the language of the Army regulation in relation to the directive of the Secretary, which had established the security review program. The Court of Military Appeals remanded the case for a rehearing to consider those

<sup>4754</sup> U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

issues. The Army never conducted the rehearing, 476 so for all intents and purposes Lieutenant Colonel Voorhees was never convicted of any offense.

The importance of the Voorhees decision is twofold. First, it was one of the initial cases wherein the Court of Military Appeals specifically recognized that the Bill of Rights applied to servicemen, and it was the first case where the court specifically recognized that the First Amendment applied. Second, it held that national security considerations were a justifiable limitation on a serviceman's right of free speech and free publication of his ideas. Implicit in this latter point was the concomitant validity of the requirement that, in all cases, the material be submitted for a security review, prior to dissemination. The court reasoned that the serviceman might be making an inadvertent security disclosure, and therefore the requirement that all must submit any material desired to be given to the public at large was justified. Further, the court ruled (as quoted above on page 261) that prevention of the unauthorized disclosure of classified defense information was the critical point, and that such prevention could only be successfully accomplished by a system of prior censorship review. Thus the court held the system to be constitutional. 477

<sup>476</sup> N.Y. Times, 4 Nov. 1954, at 12, col. 4.

<sup>477</sup> Two other aspects of censoring will be reserved for discussion within the general framework of the area of good

Based on the 1971 New York Times case in the Supreme

Court, and on the common-sense aspects of the situation, there

seems to be little doubt but that the Court of Military Appeals'

decision in <u>Voorhees</u> is constitutionally correct.

e. Conclusions Concerning External Security and Freedom of Speech

While at first glance certain prohibitions in the interest of protecting the nation from external invasion—such as treason, espionage, and those military offenses involving communications with the enemy discussed above—may all appear to involve expression, a closer analysis indicates that they are more properly classified as limitations on action. Thus they do not fall within the protections of the First Amendment.

The only remaining area which does involve expression is the entire set of prohibitions, rules, and censorship procedures surrounding classified defense information. Certainly

order and discipline. To avoid confusion, they should be briefly mentioned at this point. The first is that the regulations involved in the <u>Voorhees</u> censoring case (both in 1954 and in their present form) appear to authorize censoring based on standards other than national security. As these standards purportedly relate to internal security, they will be discussed under that heading, <u>infra</u> at pp. 308-314. The second is that certain other regulations exist which require the submission to military authorities of any written matter desired to be distributed on a military installation by means other than the military distribution system. Permission to distribute may be denied, based on the content of the writing in question. As the standards which form the basis for this kind of censoring purportedly relate to good order and discipline, this issue will be discussed under that heading, <u>infra</u> at pp. 370-379.

no one could rationally disagree with Justice Stewart's statement in the 1971 New York Times case that a certain amount of secrecy is mandatory in the conduct of a meaningful national defense. Since the military is the instrument of that defense, the military has an inseparable connection with that mandatory secrecy. And since the military is nothing but an aggregate of individual servicemen, the individual serviceman has an inseparable connection with that secrecy. It is simply part of his job as a serviceman. Thus many aspects of his speech are job-connected, and therefore so intertwined with the secrecy involved in national defense, that some restrictions are inevitable—if, indeed, the secrecy is to be maintained successfully.

Further, if the purpose of the military is to provide for the national defense, the military must base its entire concept of operations on the assumption that it may be called upon to exercise that function momentarily. This means that the military operates on a virtual wartime basis, all the time. Thus its individual members are required to safeguard classified defense information at all times as zealously as if the nation were actually at war. If anyone must be sensitive to the secrecy involved in national defense, it must be the instrument of that defense—the military.

This being the case, the restrictions on the full exercise of a serviceman's First Amendment rights imposed in the interests of national security are inevitable and mandatory.

Assuming that "In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident," 478 such restrictions are not an unconstitutional abridgement of a serviceman's First Amendment rights.

## 2. Internal Security

In the American ethic, the only real justification for the existence of a standing military establishment is the defense of the nation from external invasion. However, the mere existence of such a military force is in itself a potential—although thankfully never yet a real—threat to the survival of the democratic republican system of government which the United States enjoys. The military clearly has the technical means and knowledge to effect the overthrow of the civilian government by means of force and violence.

To this fact must be added a deep-seated distrust of the military in the minds of the Founding Fathers. This is clearly reflected in the constitutional scheme which gives tactical control over the military to the President as Commander-in-Chief, while leaving the "governing" power and especially the purse strings in Congress' hands. It also is reflected in contemporary writings of the time the Constitution was drafted, which writings are too numerous to cite.

<sup>478403</sup> U.S. at 728.

For these reasons, it is not unreasonable that some restraints be placed upon the military to insure the survival of the civilian government. And because the military is physically prepared to effect an immediate overthrow of the civilian government, it also is not unreasonable that the controls on the military be imposed prospectively—that they attempt to prevent a military takeover, not only to punish it if it occurred. Indeed, if a military takeover did in fact occur, what civilian power would there be to punish those responsible? Thus the civilian government has sought prospectively to protect itself from forceful military overthrow.

of course it also is possible that the military would not be the source of a forceful overthrow of the civilian government from within the United States itself. Thus there are laws also relating to civilian overthrow of the civilian government, by means of force. And, as has been noted previously, a serviceman is subject to both these laws because of his dual status as a citizen and a member of the military.

Let us now examine the major controls which have been imposed to effect this internal security and consider to what extent they properly restrict the exercise of a serviceman's First Amendment rights.

## a. Sedition Laws

Sedition laws have had a long and unhappy history both in the United States and in England. Indeed, the initial cases

wherein the Supreme Court first considered the First Amendment's privileges arose from prosecutions alleging violations of the same provisions now contained in 18 U.S.C. § 2385 (1970), as then applicable through the 1917 Espionage Act. 479

As noted earlier, through the operation of the "crimes and offenses not capital" provisions of Article 134 of the Uniform Code of Military Justice, servicemen are subject to prosecution in a court-martial for violations of various Federal laws. Clearly the sedition portion of the Smith Act of 1940, 18 U.S.C. § 2385 (1970), is such a law. 480

The offenses denounced by 18 U.S.C. § 2385 fall into two

<sup>479</sup> See supra, n. 436.

<sup>480</sup> In addition to the Smith Act of 1940, there are other Federal statutes which are properly classified as "sedition" laws. They are the Internal Security Act of 1950, 50 U.S.C. 88 781-798, 811-826 (1970), as amended in 1968; and the Communist Control Act of 1954, 50 U.S.C. \$6 841-844 (1970). These statutes involve, mainly, registration provisions for Communist and Communist-front organizations. The courts have largely nullified them by their decisions; particularly, the requirement for individual registration--which would be the provision directly applicable to a serviceman, if any portion is at all--has been held invalid as violating the Fifth Amendment's self-incrimination provisions. See Communist Party v. United States, 331 F.2d 807 (D.C. Cir. 1963), cert. denied, 377 U.S. 968 (1954); Communist Party v. United States, 384 F.2d 957 (D.C. Cir. 1967); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). Further, the provision making it criminal for a member of a Communist organization to hold Federal employment or employment in a defense facility (civilian-owned) --which again would be directly applicable to a serviceman--has been invalidated by the general principles announced in United States v. Robel, 389 U.S. 258 (1967) (although Robel was a civilian employed in a civilian-owned defense facility). Accordingly, no direct discussion of these "sedition" laws will be made herein. For a complete discussion of the evolution of the law and the cases concerning each, see Emerson at 129-152.

categories. The first is essentially that of teaching or actually advocating the overthrow of the United States Government by means of force and violence; the second is essentially that of organizing, becoming a member of, or affiliating with, a group expressly organized for the purpose of teaching or advocating the overthrow of the United States Government by means of force and violence.

in the context of the Communist Party. While there were some initial convictions, 481 the Supreme Court finally ended them with its 1957 decision in Yates v. United States. 482 This happened because the Court held that the Government had not proven that the Communist Party actually taught or advocated the overthrow of the United States Government by force and violence, despite its "advocacy of ideas" along those lines. The Government, apparently unable to meet the evidentiary requirements established by the Court, did not renew the prosecutions of the defendants in the Yates cases who were remanded, nor has it initiated any further prosecutions since under 18 U.S.C. § 2385(1). As has been noted earlier, the Court of Military Appeals holds itself bound by the constitutional requirements imposed by the Supreme Court. 483 Accordingly, the Gov-

<sup>481</sup> see supra, n. 436.

<sup>482354</sup> U.S. 298 (1957).

<sup>483</sup>United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

ernment in a military prosecution would have to meet the same burden of proof that the Supreme Court required in <u>Yates</u>. Research has failed to disclose any military prosecution under this section of the Smith Act of 1940.

However, in Scales v. United States, 484 a civilian case prosecuted under 18 U.S.C. § 2385(2), the Supreme Court found that the Government had met the requisite burden of proving that the organization--again the Communist Party--did teach or advocate violent overthrow of the Government. This being proven, the Court then required that the defendant be proven not to be merely "a nominal, passive, inactive, or purely technical" member, but one who had "the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit, " and that he be one who had "knowledge of the proscribed advocacy." 485 Thus despite the collapse of the Yates prosecutions under 18 U.S.C. § 2385(1), Scales shows that the evidentiary standards required under both subsections (1) and (2) can indeed be met in appropriate cases. Despite criticism that these provisions of the Smith Act violate the First Amendment because they limit the full and free exercise of speech, as well as the freedom of association, it simply appears that the Supreme Court will adopt a "prevention theory" in this area and will, within certain boundaries of

<sup>484367</sup> U.S. 203 (1961).

<sup>485367</sup> U.S. at 229-230.

proof (as outlined above), allow such prosecutions as an exception to the First Amendment.

There have been two military prosecutions under 18

U.S.C. § 2385(2), as it is assimilated into the Uniform Code

through Article 134. The first of these cases, <u>United States</u>

v. <u>Dorey</u>, 486 was a guilty plea and therefore is completely uninstructive—at least the Court of Military Appeals never discussed the merits of the offense, much less its constitutional
merits. The second case, <u>United States v. Blevens</u>, 487 did reach
the merits—and is a very troublesome case indeed.

Blevens was decided by the Court of Military Appeals in 1955, which was six years before the <u>Scales</u> decision by the Supreme Court. Therefore, the Court of Military Appeals did not apply the <u>Scales</u> criteria, especially as they applied to the issue of association. However, the court ended up with about the same requirements. The specification which finally emerged in <u>Blevens</u> on appeal alleged that Blevens had "knowingly affiliated" with the Communist Party, in violation of Article 134 as conduct tending to "discredit" the Armed Forces. The court determined that the key word in the specification was "affiliated," and said that that word "implies something less than membership in an organization, but more than passive sympathy

<sup>48614</sup> C.M.R. 350 (CM 368567), pet. denied, 4 U.S.C.M.A. 724, 15 C.M.R. 431 (1954).

<sup>4875</sup> U.S.C.M.A. 480, 18 C.M.R. 104 (1955).

for its purpose. It contemplates an active alliance in furtherance of the functions of the group." 488 Notwithstanding this closeness to the <u>Scales</u> definitions concerning affiliation, and the fact that it is clear today that the Court of Military Appeals will apply to the full extent all the Supreme Court's ruling in this area, there are still some troublesome problems with the <u>Blevens</u> decision. 489

The first question in <u>Blevens</u> was whether the specification alleged an offense assimilating the provisions of 18 U.S.C. § 2385(2). That question was never satisfactorily answered by the court. Partly this was due to the fact that the specification itself did not allege that Blevens' "affiliation" violated the United States Code; additionally, the court ruled that the Government had failed to bear the burden of proof to meet all the requirements for a conviction under 18 U.S.C. § 2385(2). However, what the court did hold was that a conviction of an offense "discrediting" the Armed Forces, in violation of Article 134 of the Uniform Code, was both alleged by the specification and proved by the Government. Further, the court ruled that even if the specification did allege a violation of 18 U.S.C. § 2385(2), an offense of "discrediting"

<sup>4885</sup> U.S.C.M.A. at 490, 18 C.M.R. at 114, citing Bridges v. Wixon, 326 U.S. 135 (1945).

<sup>489</sup> See Note, Military Personnel and the First Amendment: "Discreditable Conduct" as a Standard for Restricting Political Activity, 65 Yale L.J. 1207 (1956).

the Armed Forces by knowingly affiliating with the Communist Party was lesser-included within the specification. Military law, like civilian law, operates on a scheme of charged offenses and lesser-included offenses which are "fairly included" within the greater offense. 490 Thus to find a lesser-included offense in Blevens was not in itself unusual; what was unusual was to find that conduct not amounting to a violation of 18 U.S.C. § 2385(2) could nonetheless constitute punishable conduct.

With the change in membership on the bench of the Court of Military Appeals since 1955 when <u>Blevens</u> was decided, one cannot predict with certainty whether the court would adhere to its determination about the lesser-included offense in <u>Blevens</u>. However, were the court to do so, it would have to formulate a theory to show that a serviceman's mere affiliation with an organization, <u>not</u> constituting a violation of 18 U.S.C. § 2385(2), "discredited" the Armed Forces to such a degree that the imposition of criminal sanctions would be permissible. That would be difficult to do.

In the first instance, there is a clear constitutional problem. Under no test evolved by the Supreme Court in the First Amendment area would it seem that mere knowing affiliation could be constitutionally proscribed as "discrediting" to the military. If the clear and present danger test were

<sup>490</sup> This is specifically authorized by U.C.M.J., Art. 79.

applied, what danger would there be if the conduct did not amount to that required for a conviction under 18 U.S.C. § 2385(2)? If mere membership or even less, affiliation, is involved, certainly there would be no incitement upon which a conviction could be laid. Finally, if a balancing test were used, there would have to be a determination made that mere membership or affiliation in an organization of the kind in question was so detrimental to the Armed Forces' public image (can "discrediting" be defined any other way? 491) that the individual's freedom of association may constitutionally be curtailed.

Second, to rule the same as previously in <u>Blevens</u> would be contrary to the theories espoused in several more recent court decisions. For example, in <u>Boords v. Subversive Activities Control Board</u> in 1969, it was held that mere membership in the Communist Party was protected by the First Amendment. This decision was foreshadowed by the Supreme Court's decisions in <u>Aptheker v. Secretary of State</u> and <u>United</u> States v. Robel, 494 both of which nullified on First Amend-

<sup>491&</sup>lt;u>Cf.</u> M.C.M., para 312<u>c</u>: "'Discredit' as here used means 'to injure the reputation of.' This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem . . . "

<sup>492421</sup> F.2d 1142 (D.C. Cir. 1969).

<sup>493&</sup>lt;sub>378</sub> U.S. 500 (1964).

<sup>494389</sup> U.S. 258 (1967).

ment grounds two of the ancillary punitive provisions of the Internal Security Act of 1950.

Third, there is a close analogy between conduct amounting only to expression (to include association) forming the basis of criminal punishment, because the conduct "discredits" the Armed Forces, and that conduct proscribed by the nation's first Sedition Act of 1798. Although the 1798 Act expired in 1801, it has generally been considered unconstitutional; indeed, at the late date of 1964 the Supreme Court actually said that the 1798 Sedition Act violated "the central meaning of the First Amendment." 495 The relevant portion of the 1798 Sedition Act made it a criminal offense for any person to

write, print, utter or publish, or . . . knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute . . .

If it violates the First Amendment to prohibit expression which brings the President into "disrepute," it would certainly seem to be likewise unconstitutional to prohibit expression which "discredits" only an executive agency under the control of the President—the Armed Forces.

Finally, mention must be made of the Supreme Court

<sup>495</sup> New York Times v. Sullivan, 376 U.S. 254, 273 (1964).

decision in O'Callahan v. Parker, where the Government contention, that conduct of a "discreditable" nature was a sufficient nexus to military service to make any such offense service-connected, was rejected by the Supreme Court. 496

Thus O'Callahan makes it doubtful that courts-martial have any jurisdiction over acts which only "discredit" the Armed Forces, and nothing more.

Considering all these factors, it seems impossible to say that any Government agency's (namely, the military's) public image is so important that it would outweigh an individual's constitutionally-protected rights, especially to the point where a criminal penalty could be imposed for the exercise of that right. Based on all the factors involved, it is assumed that the Court of Military Appeals would not rule the same way if <u>Blevens</u> were to come before it now.

In addition to the civilian laws assimilated into the Uniform Code of Military Justice through Article 134, it should be noted that the Code itself contains a sedition law in Article 94(a)(2). That provision states that anyone subject to the Uniform Code who,

<sup>4960&#</sup>x27;Callahan v. Parker, 395 U.S. 258 (1969). The Government argument that the service-discrediting factor was a sufficient "service connection" to justify in itself the exercise of court-martial jurisdiction was argued by the United States in its brief. Brief for the United States, pp. 27, 28. In response from the Court, compare 395 U.S. n. 19 at 274 (majority opinion) with 395 U.S. at 281-284 (dissent). In essence, the majority rejected the argument.

with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition.

Analysis of this law reveals that in order to be guilty one must <u>do</u> something; indeed, if speech is involved, that speech must either actually cause or directly result in "revolt, violence, or other disturbance against [the civil] authority." Viewed in this light, what the military sedition law requires for conviction is a finding of action, not expression. And therefore it is clear that such conduct is not protected by the First Amendment.

Regardless of how much one may disagree with the propriety, need, and constitutionality of sedition laws in relation to the civilian community, the existence of Article 94(a)(2) in the Uniform Code of Military Justice is not inappropriate. It must be stressed again that, of all the various groups within the American society, only the military has the training and the means for actually effecting an immediate overthrow of the civilian Government by means of force and violence—and it possesses those means openly and continuously. Indeed, that is its business; it could do nothing else. But the fact is that the danger exists. Accordingly, to maintain civilian supremacy over the military is a highly desirable and even mandatory point in the American govern—

<sup>497</sup> Accord, M.C.M., para. 173b.

mental scheme, and that is exactly what the Constitution establishes. Hence, it is clearly appropriate for Congress to buttress that scheme and that goal with a sedition provision in the Uniform Code of Military Justice, requiring action and expressly applicable only to the military.

b. Article 88, Uniform Code of Military Justice
In addition to the sedition provision contained in
the Uniform Code, Congress has also sought to maintain civilian supremacy and control over the military in another way.
That scheme is contained in Article 88 of the Code:

Art. 88. Contempt toward officials
Any commissioned officer who uses contemptuous words against the President, the Vice President,
Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

This provision has a long history in military law, going back in similar form to a law of Henry VIII of England in 1513 and continuing from 1776 to the present in American military law-at least so far as the Articles of War governing the Army were concerned. And with the effective date of the Uniform Code of Military Justice in 1951, the provision became applicable

<sup>498</sup> The historical portions of the discussion are summarized from Kester, Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice, 81 Harv. L. Rev. 1697, 1701-1720 (1968).

to officers of all the military services.

Obviously the statute in English law related to contempt toward the king. When it was adapted to fit into the American Articlesof War of 1776, the king was changed to the original Congress formed under the Articles of Confederation. And with the founding of the Republic in 1789, the amended versions of the subsequent Articles of War consistently have reflected changes in the form of the Government. Thus the 1950 Code includes the Secretary of the Treasury because in peacetime the Coast Guard is under his authority. In sum, it is clear from the face of the article that it is closely akin to the Sedition Act of 1798.

This is further borne out by an examination of the legislative histories involved. Article 62 of the 1916 Articles of War added the Secretary of War and the Governor or legislature of a state, territory, or possession in which a soldier might be present. Testimony before the Congressional committee concerned stated that the article was necessary to be included "to be expressive of the principle of subordinating the military authority to the civil." The Senate debates concerning the provision in the 1950 Uniform Code come out to essentially the same point. The Senaticle in the

<sup>499</sup>Hearings Before the House Comm. on Mil. Affairs on H.R. 23628, 62d Cong., 2d Sess. 55 (1912).

<sup>500&</sup>lt;sub>1949</sub> Senate Hearings 99ff.

1950 Code passed the House without any comment at all. 501)
Thus, from a Congressional-intent point of view, the purported reason for having Article 88 is to assure civilian control over the military.

Looking at that reason objectively, how could Article 88 accomplish its goal? The only line of thought which comes to mind is that which has been summed up as the "man on a white horse" theory: That some military leader, dashing and heroic and riding a white horse, would so capture the imagination of the people that he could lead them into revolt against the civilian Government. Further, he could similarly persuade the military itself to obey his commands. Thus he would be able to take over the Government by means other than the democratic process. Therefore (the line of thought goes), he must not be allowed to speak out contemptuously against certain civilian officials. Does that follow? Not at all. If the "man on a white horse" were really the threat that he is imagined to be, he should be adroit enough to accomplish his purpose without speaking contemptuously. Thus the article is really incapable of accomplishing its goal. And, therefore, it amounts to no more than a sedition law.

It has been suggested that the article could perhaps be "saved" if it were redrafted to apply only to officers of

<sup>501</sup> Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 1226 (1949).

the rank of full colonel and higher, or their equivalents in the Navy, or even only to general or flag officers. 502 This suggestion follows from the purpose purported to be that behind limiting the 1950 Code's provision only to officers, since under the Articles of War it had been applicable to any Army member, regardless of rank. But from a constitutional standpoint, nothing would be accomplished by further limiting the applicability of the article only to full colonels, Navy captains, generals, or admirals. While it is factually true that only they would probably be in a position of power sufficient to allow them to become the "man on a white horse," if that supposed purpose of the article is unconstitutional itself, nothing would be gained; the article would then be a sedition law directed only against full colonels, Navy captains, and/or general or flag officers.

In a truly definitive article in the <u>Harvard Law Review</u>, Mr. John G. Kester analyzes every prosecution of record which he could find involving a prosecution under Article 88 and its predecessors. <sup>503</sup> He finds that the prosecutions have been limited in the main to lower-ranking individuals, and that only once has a general officer been prosecuted—and he was

<sup>502</sup> Johnson, Military Discipline and Political Expression: A New Look at an Old Bugbear, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 525, n. 10 at 526 (1971).

<sup>503</sup>Kester, Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice, 81 Harv. L. Rev. 1697, 1720-1732 (1968).

acquitted. Since 1950 and the passage of the Uniform Code, there has been only one prosecution under Article 88, and it was of an Army first lieutenant. (That case will be discussed in detail shortly.) From this analysis, Mr. Kester concludes that "history shows that the article's raison d'etre seldom has been fulfilled." 504 He elaborates as follows:

Over the years, the dominant aim of the article seems to have been to prevent disrespect toward civilian authorities lest they be subject to intimidation or embarrassment by influential military figures. Only this purpose explains the inclusion under its wing of persons to whom soldiers are not answerable: state governors, state legislatures, Congress, and the secretaries of other armed services. [The Vice President also should have been included by Mr. Kester; he is not a Vice Commander-in-Chief.] Such a purpose is consistent with the changes made by the revisers in 1950, who repealed the article insofar as it applied to enlisted men and retained it limited to officers. 505

Mr. Kester makes one other comment which is most interesting. Assuming that a high-ranking military officer had indeed attempted to usurp control of the civilian government and was prosecuted under Article 88, who would sit in judgment of him? The answer is that only a military court-martial could. While the President or the Secretary concerned could convene the court-martial, 506 the court-martial itself would by law be required to be composed of a Military Judge and, if the

<sup>504</sup> Id. at 1732.

<sup>505</sup> Id. at 1754.

<sup>506</sup>U.C.M.J., Art. 22(a)(1) and (2).

accused elected, a court (jury) of military officers. While their decision on the issue of guilt or innocence might be completely objective, since it would be based on the law and the evidence before them, military law also requires the court (jury) to impose an appropriate sentence upon conviction. Mr. Kester concludes that it is highly inappropriate for a military tribunal to punish an attempt by a military officer to take over the civilian government. Mr. Kester feels that this is more appropriately the business of the civilian courts, and that appears to be a reaction with which there could be little rational disagreement. 507

All considered, there seems to be little doubt that at least in relation to its stated purpose, Article 88 violates the essential meaning of the First Amendment, as did the Sedition Act of 1798. However, before stating that conclusion firmly, the views of the Court of Military Appeals on the issue should be considered.

The case before the Court of Military Appeals was <u>United</u>

<u>States v. Howe.</u> 508 Lieutenant Howe was stationed at Fort Bliss,

Texas, which is on the outskirts of the city of El Paso. He

participated in an anti-Vietnam war demonstration in downtown

El Paso. He was dressed in civilian clothes, he was not required to be present at Fort Bliss for other military duties,

<sup>507</sup> Kester, 81 Harv. L. Rev. at 1753.

<sup>&</sup>lt;sup>508</sup>17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

and he was properly absent from Fort Bliss. He carried a placard in the demonstration which read on one side "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS [sic] IN 1968," and on the other side, "END JOHNSON'S FACIST [sic] AGRESSION [sic] IN VIET NAM." There were video tapes made of the demonstration, and it was televised later in the news. There were some military personnel actually present at the scene as well.

Lieutenant Howe was charged with a violation of Article 88, as well as with a violation of Article 133 of the Uniform Code, which prescribes "conduct unbecoming an officer and a gentleman." He was convicted as charged and sentenced to one year in prison. Although the Court of Military Appeals technically denied Lieutenant Howe's petition for review, in point of fact the court rendered a full opinion on the merits. Unfortunately, however, the opinion leaves something to be desired.

On the constitutional issue, the court equated the Article 88 offense and the Article 133 offense, since they were both grounded on the same factual circumstances. First, the court simply assumed that the First Amendment applies to servicemen, and that a decision was required concerning the article's constitutionality. The court then cited the hoary history of Article 88 and its predecessors and noted that the Supreme Court in the case of <u>United States v. Barnett</u> had

<sup>&</sup>lt;sup>509</sup>17 U.S.C.M.A. at 168, 37 C.M.R. at 432.

<sup>510&</sup>lt;sub>376</sub> u.s. 681 (1964).

sanctioned other laws which, while arguably unconstitutional, were adopted by the very Framers of the Constitution and the Bill of Rights. The court then concluded its discussion by saying

That Article 88 . . . does not violate the First Amendment is clear. This conclusion is compelled and fortified by the recent action of the Supreme Court in United States v. Barnett . . . . 511

of course it could be said that the Sedition Act of 1798 was enacted by those same gentlemen; yet the Supreme Court had no hesitation—also in 1964, the same year as the <u>Barnett</u> decision—in saying that that Act violated "the central meaning of the First Amendment." Thus the historical approach of the court does not fare too well.

The court then went on to quote at length from (then) Chief Justice Earl Warren's New York University James Madison Lecture, entitled "The Bill of Rights and the Military," 513 wherein the Chief Justice outlined in detail the American ethic of civilian supremacy and control over the military. Finally, recognizing that Lieutenant Howe was a reserve officer and not a regular, the court concluded its comments on the First Amendment issue as follows:

<sup>51117</sup> U.S.C.M.A. at 174, 37 C.M.R. at 438.

<sup>512</sup> see supra, n. 495.

<sup>513</sup>The speech is reproduced in full in 37 N.Y.U. L. Rev. 181 (1962).

We would surely be ill-advised to make an exception for the civilian [i.e., reserve] soldier which would inevitably inure to the advantage of the recalcitrant professional military man by providing an entering wedge for incipient mutiny and sedition.

True, petitioner is a reserve officer, rather than a professional officer, but during the time he serves on active duty he is, and must be, controlled by the provisions of military law. In this instance, military restrictions fall upon a reluctant "summer soldier"; but at another time, and differing circumstances, the ancient and wise provisions insuring civilian control of the military will restrict the "man on a white horse." 514

Even assuming that the speech here involved is jobconnected, under no test used by the Supreme Court can this decision be justified as a proper limitation on First Amendment rights. If the clear and present danger test is used, the Court of Military Appeals' own language states that Lieutenant Howe himself was not that danger; rather he was convicted because at some other time and at some other place some other person might decide to be the "man on a white horse." Even viewing Lieutenant Howe's placards objectively and discounting what the Court of Military Appeals says, there are no facts to suggest that there was any clear and present danger to an overthrow of the Government arising from what Lieutenant Howe did. There was no incitement to overthrow the Government contained in what Lieutenant Howe had to say, either--unless some English teacher might have been incited to take him off and attempt to teach him how to spell! (If so, that hardly seems unconstitutional!)

<sup>514&</sup>lt;sub>17</sub> U.S.C.M.A. at 175, 37 C.M.R. at 439.

could it be said that the language of Lieutenant Howe's signs had any "bad tendency" towards an overthrow of the Government. Finally, if one attempts to apply a balancing test to the incident, one is hard-pressed to find what must be balanced against Lieutenant Howe's right of freedom of expression-at least insofar as Article 88 is supposedly designed to protect civilian supremacy of the civilian Government. Viewed in light of this purpose, the balancing test comes out to something virtually indistinguishable (except linguistically) from the clear and present danger test and the incitement test. Thus, on the stated purpose of Article 88, there appears to be no justification for upholding Lieutenant Howe's conviction even factually -- much less constitutionally. Accordingly, the Court of Military Appeals decision in Howe contributed nothing to offset the impression that Article 88, if indeed used for its stated purpose, is indistinguishable from the Sedition Act of 1798 and is therefore equally unconstitutional.

In all fairness to the Court of Military Appeals, it must be said that the court based its decision in the <u>Howe</u> case at least in part on a theory completely different from that just discussed—namely, that Article 88 is constitution—al because of its function in the maintenance of military discipline. That aspect of the opinion will be discussed in detail as part of the general discussion of military discipline and its relation to a serviceman's First Amendment rights,

later in this paper; but even if the Article can be justified on those grounds, at least it is clear that the "man on a white horse" theory is not constitutional. 515

## c. Censorship

Earlier, under the heading "Security Censorship," Department of Defense Directive No. 5320.9, dated 24 December 1966, was discussed. There was outlined the basic requirement of the directive—that any book, article, speech, or any other communication which would be presented to the public at large by a serviceman, must be presented to the Department of Defense Director of Security Review or another designated subordinate for prior clearance. And it was concluded that insofar as the directive required such prior censorship because of national security interests as they relate to classified defense material, such censorship was constitutionally permissible. It also was noted that this scheme and basis of censoring was specifically approved by the Court of

cision has opined that not only is the decision itself lacking in its discussion of the constitutional issues involved, but also that it is plainly wrong at least in relation to its reliance on the "man on a white horse" theory. See Johnson, Military Discipline and Political Expression: A New Look at an Old Bugbear, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 525 (1971); Sherman, The Military Courts and Servicemen's First Amendment Rights, 22 Hastings L. J. 325 (1971); Note, Dissenting Servicemen and the First Amendment, 1968 Utah L. Rev. 240; Kester, Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice, 81 Harv. L. Rev. 1697 (1968).

Military Appeals in <u>United States v. Voorhees</u>. 516

However, the directive goes on to say that any matter submitted may be "cleared" for dissemination only after it has been reviewed not only for security but also "for conflict with established DoD and Government policies and programs." At first blush, this "policies and programs" criterion would appear to be an unconstitutional limitation on free speech. Obviously it would at least cut off speech which did not "conform" to such policies and programs. Further, it might "chill" servicemen's desires to speak, since they might not desire to submit their real thoughts for censoring on the basis of conformity. Even a military commentator believes these criteria unconstitutional. 518

On the other hand, the Department of Defense directive apparently does not mean exactly what it says. It continues in another paragraph<sup>519</sup> that the standards of review for most Department of Defense military and civilian personnel are

(1) a matter of timing, to insure that Department of Defense personnel with "inside information" do not make a journalistic coup; (2) not contrary to laws which impose a constitutionally-

<sup>516</sup> See supra, n. 475.

<sup>517&</sup>lt;sub>DOD</sub> Dir. 5320.9, 24 Dec. 1966, para. VI.A.

<sup>518</sup> Brown, Must the Soldier Be a Silent Member of Our Society?, 43 Mil. L. Rev. 71, 94-96 (1969).

<sup>519</sup>DoD Dir. 5320.9, 24 Dec. 1966, para. VIII.A.

permissible restraint on speech; or (3) which are "inconsentent with proper ethical standards, or otherwise incompatible with the responsibilities of Government personnel . . . " Certainly all of these criteria appear to be constitutional, especially applying the job-connected test to them. Then the directive goes on to say that

Key DoD civilian and military officials may author writings dealing with national defense plans, policies, programs, or operations for exclusive publication under their by-lines only when such material is to be published in official publications of the Department of Defense and other Government agencies, service journals, house organs, recognized scientific and professional journals, and encyclopaedias. 520

"Key" officials are civilians in the Civil Service grade of GS-16 or higher, and military officers of general or flag rank, and "civilian or military personnel of lesser grade or rank whose official assignments are of unusual prominence or authority." 521 Further, provision is made for application for permission for these "key" individuals to publish or speak elsewhere than in the quoted directive's limits, as an exception to the policy. Thus it would appear that it is only to this group of "key" individuals that the "policies and programs" criteria really applies. The Department of the Army has implemented this Department of Defense directive to make clear the distinction between "key" officials and others. It

<sup>520</sup> Id., para. VII.C.

<sup>521</sup> Id., para. VII.D.1.

requires a <u>security</u> review for <u>all</u> writings and speeches, but it requires a review for conformity to "policies and programs" <u>only</u> where the individual concerned is a "key" individual. 522

An initial point of difficulty here is that the control scheme which is employed -- namely the regulatory prohibitions and requirements involved -- do not apply equally to all of those to whom they are applicable. If a "key" civilian employee violates the provisions of the directive, he can be fired. This is perhaps appropriate, especially if his speech or writing is directly job-connected. In contrast, if the individual concerned is a "key" military officer, not only could he be relieved from his duty position, and perhaps even administratively separated from the military (the military equivalent to being "fired" for a "key" officer), but also such a "key" officer could be tried by court-martial and (theoretically) punished by fine, forfeiture, or imprisonment, or some combination thereof, in addition to being punitively separated from the military ("dismissed" is the term of art employed when an officer is separated by means of a sentence of a court-martial). This difference in treatment is caused by the fact that Article 92 of the Uniform Code of Military Justice makes it a criminal offense for a military officer to violate a lawful "general regulation," which a directive published by the Secretary of Defense clearly is. There is no

<sup>522</sup>AR 360-5, 27 Sept. 1967, para. 9b(3)(a) and (b).

can only be fired, while the military officer can either be fired or tried by court-martial.

None of the regulations involved in this discussion articulates a theory for the above scheme. However, the only theory which comes to mind is again the "man on a white horse" theory--the desire to insure that the civilian Government remains superior to the military by effecting controls over what "key" military employees write and say. It is thus interesting to note that the "key" officials here involved are the same group of officials to whom some have argued that Article 88 of the Uniform Code should apply. But viewed in this light, what is really being prohibited is the criticism of established "policies and programs"; it is clear from the language of the directive that statements which conform to the policies and programs in question will be granted clearance. Thus all that has been said before concerning the factual ineffectiveness of prohibitions on speech as a means actually to prevent a military takeover of the Government apply to this case as well, and it need not be repeated. Hence the "policies and programs" restriction as it applies to "key" individuals amounts to no more than an administratively-imposed sedition act similar to that of the unconstitutional 1798 Act.

It is interesting to note that when the Court of Military Appeals considered the <u>Voorhees</u> case, the Army regulation in force then did not contain a "key" officials provision, but instead required <u>all</u> speeches and writings by military personnel of any rank or grade to conform to "policy." <sup>523</sup>
How did the Court of Military Appeals react to this provision?

Unfortunately it is not completely clear just what
the court's views were in this regard. Perhaps the major
basis for the court's reversal of the <u>Voorhees</u> conviction
was an apparent discrepancy between the Army regulation and
the directives the Army had received from the Secretary.

Those directives required a review only for "security."

Thus it could be said that the Army's extension of its review criteria to include "policy" as well was unauthorized,
since it had not been furnished that criterion by higher authority. On the other hand, there are intimations that the
court simply avoided this problem by reading the "policy"
criterion as a mere elaboration of the "security" criterion-or, phrased differently, that the court interpreted "policy"
in this context to mean only a special kind of national security.

<sup>523</sup>The Army regulation in effect at the time of the <u>Voorhees</u> case also required clearance for "propriety." The current version of the Army's implementing regulation also requires review for "accuracy and propriety." AR 360-5, 27 Sep. 1967, para. 9b(3)(c). However, the current paragraph now states that the review for "accuracy and propriety" is "purely advisory in nature, and will be identified as such. The final decision in matters of accuracy, style, and good taste rests with the author." Consequently, this standard for review is not a restraint on speech.

However, the final thrust of the decision was to remand the case for a new trial on the basis of resolving the possible ultra vires question; but since the Army dismissed the charges and never held the rehearing, 524 the issue has never been resolved. Additionally, it must be noted that the court's composition has changed radically since 1954 when Voorhees was decided, with only Judge Quinn still on the bench at the present. In the interim, the court has made strong pronouncements concerning a serviceman's right of free speech, particularly those quoted earlier on page 247. Thus it would appear that by one device or another--either by interpreting the regulation to be constitutional by having it apply to national security, internal management controls, or other lawful restrictions on speech; or by simply declaring the "policies and programs" criterion constitutionally invalid -- the Court of Military Appeals might protect a serviceman's right to free speech in this instance.

d. Conclusions Concerning Internal Security and Freedom of Speech

There is no reason why the sedition portions of the Smith Act or any other civilian law which would be applicable to servicemen should apply to them more stringently than to other citizens, simply because they are servicemen. Conversely, to whatever extent those laws are deemed constitutional,

<sup>524</sup> See supra, n. 476.

they certainly may be used to limit the speech of servicemen as well as anyone else.

This line of reasoning does not apply to the military sedition act contained in Article 94(a)(2) of the Uniform Code of Military Justice, since that provision applies only to servicemen. But given the ability of the military to take over the civilian Government and the American fear of that possibility, it certainly is not unreasonable to include such a prohibition in the military code. Particularly is this true when the provision itself requires some kind of action and does not depend on expression alone.

On the other hand, there are serious constitutional problems concerning Article 88 of the Uniform Code, contempt towards officials, and Department of Defense Directive No. 5320.9, the censorship directive. Article 88 specifically prohibits speech, and only speech. It cannot possibly accomplish its purported goal, namely, prohibiting a military takeover of the civilian Government, only by limiting speech. The same is true of the "policies and programs" criterion in the Department of Defense directive. They limit only speech. To the extent that the "policies and programs" provisions apply only to "key" officials, their only legitimate intent could be to prohibit a military takeover of the civilian Government. But, like Article 88 of the Uniform Code, that legitimate intent cannot be accomplished only by pro-

hibiting speech. Thus, when both Article 88 and the Department of Defense directive fail to accomplish their purported intent, they constitute nothing more than a restatement of the Sedition Act of 1798. And, like that act, they are unconstitutional. 525

## 3. Good Order and Discipline

Numerous comments concerning discipline and its role within the military have been made previously in this paper and need not be repeated here. Suffice it to say that good discipline within the military is required because it engenders obedience of lawful orders and thus serves as the foundation for the efficient operation of what can be a most unpleasant business. Thus it is one of the major justifications for many differences between military and civilian liferand not only in relation to constitutional issues. However, mention must be made at this point of the relationship between good order and discipline.

The military looks upon good order in the way it looks upon snappy saluting—it is both an indicator of and a direct cause of good discipline. A riotous mob is not disciplined, nor could it be brought to disciplined behavior without stren-

<sup>525</sup> It is not intended to be asserted that the censoring provisions of DoD Dir. 5320.9 as they apply to security, internal management controls, and other legally-imposed restraints on speech are invalid; here, only the "policies and programs" criterion, as it applies to "key" officials, is the issue of suggested unconstitutionality.

uous effort. The military cannot afford to expend that effort in times of national crisis. And since the military must operate on the assumption that any moment might be the moment of national crisis when its services are demanded, it cannot brook discord and disharmony within its ranks.

Calm--paraphrased as "good order"--must prevail. Thus a simple breach of the peace within the military environment is considered directly detrimental to good military discipline. In fact, the two concepts are so intertwined as to be virtually inseparable; at least the so-called "general article" of both the Articles of War and the Uniform Code of Military Justice proscribe conduct "to the prejudice of good order and discipline" within the military. It also is interesting to note that the two are always joined conjunctively, as "good order and discipline." 526

The military considers the morale of its servicemen as being another factor which is both indicative of and which directly contributes to good military discipline. Frequently one sees this concept in the French, "esprit de corps." The concept implies that in order to achieve that degree of willingness required for true military discipline, there must be some kind of motivation within the serviceman. Or, phrased differently, his morale must be high. And in addition to the

<sup>526</sup> U.C.M.J., Art. 134.

high morale of the individual, the morale of the group concerned (the "corps" in "esprit de corps") must be high.

It is immediately apparent that the full exercise of one's freedom of expression could easily dispel calm. Also certain speech could breed dissatisfaction to the point where morale would be low. In either case, military discipline would decline. And further, it also is clear that some speech--such as calling one's superior commander a vulgar name--is directly destructive of good discipline. On the other hand, unless servicemen have some right to speak, the First Amendment would be totally inapplicable to the military situation. But recent holdings by the Court of Military Appeals make it plain that the First Amendment does apply to servicemen. 527 In addition, the Supreme Court has held that even though some speech be annoying or even strong so that it evokes strong reactions, it nonetheless has protection at least to some degree. 528 Therefore, the old issue of where to draw the line between these considerations becomes the problem -- to what extent can the military restrict the full exercise of a serviceman's right to freedom of expression, in the name of good order and discipline, and morale?

<sup>527</sup>United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).

<sup>528</sup> Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

## a. Mutiny

The ultimate act against military command, discipline, and control is the act of mutiny. It is proscribed by Article 94(a)(1) of the Uniform Code as follows:

(a) Any person subject to this chapter who--(1) with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny . . . .

The discussion of this offense contained in paragraph 173a of the Manual for Courts-Martial shows that the offense of mutiny can be committed in either one of two ways. First, there is the active type, where the individuals concerned, with the requisite intent, create "any violence or disturbance." Second, there is the more passive kind, where the individuals concerned, again having the requisite intent, refuse "to obey orders or otherwise do [their] duty."

The first of the ways listed in which mutiny can be committed gives no First Amendment difficulties, since it clearly restricts only actions. The second type, however, could easily be committed by the individuals concerned simply expressing the opinion that they would not "obey orders or otherwise do [their] duty." However, a purely verbal refusal is not the real evil which the statute attacks; it is, rather, the fact that the individuals do not act as directed by competent authority. Thus this type of mutiny offense should also be categorized as "action"—in the negative sense—instead of "expression." 529

<sup>529</sup>Because any other willful refusal to obey military orders, as well as the simple disobedience (nonfeasance) there-

Viewed in this light, what either aspect of the mutiny offense requires is action, not expression. And therefore it is clear that such conduct is not protected by the First Amendment.

- b. Disrespect Offenses
- Earlier in this discussion, under the heading "Internal Security," Article 88 of the Uniform Code was discussed in relation to its purported function of preventing a military takeover of the civilian Government. It was concluded that it could not actually accomplish that purpose by limiting speech alone and, accordingly, that it amounted to nothing but an unconstitutional sedition law--at least in relation to its intended purpose.

However, it also was noted earlier that when the Court of Military Appeals addressed itself to the issue of the constitutionality of Article 88 in <u>United States v. Howe</u>, 530 it

of, would fall into the category of the same kind of non-action, no discussion of those military offenses involving the refusal or simple disobedience of orders will be made. The offenses involved are proscribed by U.C.M.J., Arts. 90(2), 91(2), and 92(1) and (2). It should be noted that in order to be found guilty of any of these offenses, the Government must prove that the order allegedly violated is <a href="mailto:lawful">lawful</a>. Thus if the accused could raise any First Amendment defense under one of the theories discussed elsewhere in this paper, the constitutional issue could be raised. But, assuming the order to be "lawful" in the constitutional sense, neither a willful refusal nor a simple disobedience is protected on First Amendment grounds.

<sup>530</sup> See supra, n. 508.

determined that the article was constitutional not only on the "man on a white horse" theory but also on a theory that the article assisted in the maintenance of military discipline. While the article might indeed be unconstitutional if viewed from one angle, if viewed from another it is constitutional, it should be allowed to stand. Hence the validity of the argument that the article assists in the maintenance of military discipline must be examined.

The facts in the <u>Howe</u> case were outlined earlier in detail; briefly to recount them again for the purposes of this discussion, Lieutenant Howe carried a badly misspelled placard in a public demonstration off the military installation, off duty, and dressed in civilian clothes. The sign in effect called then-President Johnson a "petty, ignorant, Fascist" and attacked his Vietnam policy.

The Court of Military Appeals' disposition of this theory of constitutionality of Article 88 is almost as brief as its comments concerning the "man on a white horse" theory. The court said concerning discipline that

The evil which Article 88 of the Uniform Code
. . . seeks to avoid is the impairment of discipline
and the promotion of insubordination by an officer
of the military service in using contemptuous words
toward the Chief of State and the Commander-in-Chief
of the Land and Naval Forces of the United States
. . . We need not determine whether a state of

<sup>531</sup>Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970).

war presently exists. We do judicially know that hundreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, into our armed forces. That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument. 532

Critics have taken the court severely to task for what they consider a rather cavalier conclusion that Lieutenant Howe's conduct created a clear and present danger to military discipline. However, before examining that conclusion in somewhat more detail than did the court, brief mention must be made of the court's use of the clear and present danger test in the Howe case, for it has been criticized for that as well. Would another test be more desirable, or perhaps more accurate? It is submitted that none would, under the facts involved, or indeed in any case where the issue is military discipline.

If one were to consider an incitement test, the issue in relation to discipline would be whether Lieutenant Howe's conduct "incited" bad discipline. In essence, that is saying nothing different from saying that his conduct was a clear

<sup>53217</sup> U.S.C.M.A. at 173, 174; 37 C.M.R. at 437, 438.

<sup>533</sup> See supra, n. 515.

<sup>534</sup> Sherman, The Military Courts and Servicemen's First Amendment Rights, 22 Hastings L.J. 325, 367-368 (1971).

and present danger to good discipline. If one takes a balancing test, the same conclusion arises -- it is virtually indistinguishable from a clear and present danger test in the context of military discipline. The interests to be balanced on the lieutenant's side would be his right to express his views in a manner which was less than respectful to the President. On the other side would be the Government's interest in the maintenance of good military discipline. Only if the lieutenant's expression constituted some kind of very real--"clear and present"? -- danger to that discipline could the Government's interest be said to outweigh the lieutenant's right to speak his mind freely. Thus in the situation where the issue is military discipline, the Court of Military Appeals' articulation of the problem in terms of the clear and present danger test is as meaningful a formulation of the problem as any other test, and perhaps it even states more clearly and forthrightly the essence of the actual problem.

Was there, then, any clear and present danger to good military discipline which Lieutenant Howe's conduct posed—or at least was the danger sufficient to curtail his right to free speech? The military would most assuredly contend that the answer is "yes"—and the Court of Military Appeals felt that the point was so clear that it did not demand discussion at all.

The theory centers on discipline, clearly a job-connected

concept in relation to a serviceman. The theory is, simply, that discipline is a state of mind, which implies the willing and cheerful obedience of lawful commands. If one treats a superior officer contemptuously or with other kinds of disrespect, that conduct is indicative of the likelihood that the individual concerned may not follow his superior's orders, if it were required that he do so. It is not human nature to be fully obedient to one to whom one feels disrespect and contempt. Further, the argument extends beyond one to whom the individual must be directly obedient. When one is disrespectful to any superior officer, whether in the "chain of command" over the individual concerned or not, that disrespect indicates the likelihood that military orders in general will be disobeyed by the individual. Indeed, the more remote the officer involved is from the individual who is disrespectful, the more it could be contended that the individual would be likely to disobey military orders emanating from any lawful source. Thus at whatever level concerned, disrespect is indicative of a breakdown in military discipline.

Further, if the disrespect were permitted to stand unpunished, the offender might also get the idea that he could
disobey lawful superior orders with impunity. Considering the
possible cost—in human life, especially—that such an attitude could cause, it cannot be nurtured by allowing disrespects
to go unpunished. The theory that punishment of disobediences,

if they indeed occur, is sufficient to deal with the evil is incorrect. It is the individual's state of mind--his "state of discipline," if you will--which is at stake. Punishing after-the-fact disobediences will not secure that before-the-fact mental attitude which is so vital. Also, if a disrespect were allowed to go unpunished, and if others were privy to the disrespect and the fact that it went unpunished, those others might conclude that they too could disobey orders with impunity. The likelihood that this result might ultimately cost human life makes it mandatory that no one get the idea, even indirectly, that the disobedience of lawful orders will go unpunished.

Finally, it should be noted that in most disrespect situations the disrespectful language is not really intended to communicate anything; usually, the individual concerned is simply venting his emotions. Lieutenant Howe could certainly have communicated his political sentiments without calling President Johnson a "petty, ignorant Fascist." If Lieutenant Howe, and others, are to be disciplined members of the military, they must learn to subordinate their emotions to the military mission and to the orders received in furtherance thereof. It is this concept which is involved in prohibiting disrespect towards superiors, as well as the other considerations mentioned.

Thus the entire area is one where the prohibitions in-

volved are demanded by the possible adverse military consequences. And it is the danger of these "consequences" which the Court of Military Appeals saw as being so clear and present that it demanded no further discussion.

Approaching this problem from the expression-action theory, it might be argued that all forms of disrespect, verbal or otherwise, do not usually have as their purpose that of communicating opinions about the other individual involved; instead, their purpose is to insult that individual. Thus it could be argued that they are not really expression but are action; indeed, why should there be a legal distinction between a contemptuous failure to salute (clearly action) and contemptuous language, when it is the disrespect and not the manner in which it is conveyed which is the real issue? Of course one could contend that both the contemptuous salute and the contemptuous language are expression, and they are indeed intended to communicate exactly what they do convey-that the individual does not respect the superior involved. But if this is the case, then one must revert to the clear and present danger test and conclude that the danger is simply too great in the military context to allow the expression to be constitutionally-protected.

It is worthwhile at this point to note that through an extensive analysis of all the prosecutions under Article 88 and its predecessors, Mr. Kester in his article in the <u>Harvard</u>

<u>Law Review</u> came to some interesting conclusions. <sup>535</sup> It was said earlier that he concluded that Article 88 was never really used to prosecute the "man on a white horse." What, then, was it used for? Mr. Kester says

Instead of chastising insubordinate generals, the article has usually served as an extra prop for the Army's already formidable system of internal discipline, and a rather superfluous prop at that. Had historical accident not made contemptuous language against civilian officials a specific offense, no doubt the Army would not have hesitated to prosecute such conduct under the general article [now Article 134] -- which punishes conduct "to the prejudice of good order and discipline," conduct tending to bring discredit on the armed forces, and noncapital crimes not specified elsewhere in the Code--or, where possible, as "conduct unbecoming an officer and a gentleman" [now Article 133]. Such was the course followed throughout the years by the Navy, which lacked a specific prohibition in the articles by which it was governed before 1951.536

It is apparent from the foregoing passage that Mr.

Kester does not accept the disciplinary theory as a basis

for Article 88's constitutionality. Instead, he character
izes the disciplinary argument as

a sort of disciplinary domino theory: since effectiveness of the Army depends on discipline, and discipline involves obedience and respect towards one's superiors, therefore it is essential that no word of disrespect toward the ultimate superior, the Commander-in-Chief, be tolerated. 537

Although obviously intended by Mr. Kester to be a telling,

<sup>535</sup> See supra, n. 503.

<sup>536</sup> Kester, 81 Harv. L. Rev. at 1734 (footnote omitted).

<sup>537</sup> Id. at 1753.

adverse criticism of the disciplinary argument involved here, his last-quoted language succinctly and accurately states the proper disciplinary theory—despite the rather unappetizing nomenclature of it being a "disciplinary domino theory."

However, he is simply wrong when he says that Article 88 is a "superfluous prop" to the military discipline system, especially when he himself notes that the Navy used the general article prior to Article 88 being made directly applicable to it. If Article 88 is indeed superfluous, why did the Navy use a substitute for all those years?

The critical point is the fact that there simply is no way other than through the general article that an offense of "disrespect" towards the President can be punished. This is because disrespect towards a superior commissioned officer under Article 89 of the Uniform Code requires that that superior be exactly what is stated—a superior, commissioned military officer. This is clearly the intent of Article 89's language, and it is reinforced by the definition of "commissioned" contained in Article 1(5) of the Code. The general articles could indeed be used in this case, since it is the military theory that good order and discipline are prejudiced by such disrespects; but the military is always highly criticized for the "vagueness" and "overbreadth" of the general articles. Is it not better specifically to state the offense, as has been done in Article 88?

One other consideration is also important. If the ultimate goal of Article 88 is to assure continued civilian supremacy and control over the military, should not disrespects to those civilians who are in actual control be brought within the military framework of discipline? If the civilians who actually control the military were left <u>outside</u> its disciplinary scheme, servicemen could be misled into thinking that they were not really a part of that control-scheme established by the Constitution. Thus while the "man on a white horse" theory may be invalid to maintain that supremacy, the disciplinary theory of Article 88 might actually accomplish it.

However, all of this seems to beg the question, since the real issue is whether an offense of contempt towards officials is constitutional, regardless of whether a specific article or the general article is used as the basis for prosecution. Thus the real question at this point is, can Article 88 be sustained on a disciplinary theory?

Mr. Kester answers "no." He asserts that the President and other similar civilian officials are simply "too remote" from an individual like Lieutenant Howe, and therefore Mr. Kester would contend that the application of Article 88 should be limited to those superiors

with whom [the offender] can be expected to come in contact . . . [W]hether the required obedience will be affected at all by statements of dislike towards a remote political figure with whom the speaker's relation is little more than an abstraction is at least problematical. 538

In the first place, vis-a-vis any serviceman, the President is not solely a "political figure"; he also is that serviceman's Commander-in-Chief. Every unit orderly room (at least in the Army) posts pictures of the "chain of command" so that each serviceman, regardless of rank, will know where the orders come from. And always at the top of the pyramid is a picture of the President, then the Secretary of Defense, the Secretary of the service concerned, and (usually) the chief military officer in the "chain" (such as the Army Chief of Staff). Certainly it could not be contended that the civilian officials involved are any more "remote" from most servicemen than the head of their military service, such as the Army Chief of Staff for Army servicemen. Yet it is clear beyond question that the Army Chief of Staff is a superior commissioned officer of any Army member, and that any disrespect towards him could be punished under Article 89 of the Code. If Mr. Kester's "too remote" theory were accepted, any disrespect prosecution under Article 89 towards "remote" superior military officers would have to be abandoned as well. Where would the line be drawn? How remote is "too" remote?

The "too remote" argument also fails to consider one other critical factor: All service regulations are published at departmental level, "by order of" the Secretary concerned. While other regulations (largely supplementary to the departmental ones) may be published by military headquarters, such supplementary directives cannot conflict with those originat-

ing at departmental level; the departmental level regulations are superior. If, then, the Secretary of a military department is "too remote" from servicemen because most servicemen will never come in contact with him, is the Secretary also so remote that servicemen are relieved of the obligation to obey his orders and follow his directives?

The fact is that the military is a complex, interlocking directorate of both civilian and military control. The civilian aspects of that control are fully integrated into the system. This is demanded by the constitutional scheme. And in recognition thereof, those civilian officials who occupy direct command positions over the military are simply not "too remote" from individual servicemen. Thus it is as important to demand respect and obedience towards those officials as it is to demand similar respect and obedience towards superior military officials.

But--unfortunately--this all overstates the case. The entire disciplinary argument--which, it is submitted, is a good one, both factually and constitutionally--is valid only in relation to those civilian officials who have a military relationship to servicemen. Clearly the Vice President, Congress, or the Governor or legislature of any State, Territory, Commonwealth, or possession of the United States have no military command control authority over any serviceman. Thus being disrespectful towards one of those individuals or bodies

has no relation to discipline. The same problem results from the unfortunate overly-broad language of the article as it proscribes contemptuous words towards the Secretaries of all the military departments, or towards the Secretary of the Treasury. Certainly an Army officer has no command relationship to the Secretary of the Navy. Thus being disrespectful towards a designated civilian official who has no military command authority over the individual concerned has no relation to the discipline of that serviceman.

Perhaps one way that Article 88 could be "saved" on a purely disciplinary theory would be to amend its language to prohibit contemptuous words only towards "the President, the Secretary of Defense, and the Secretary of the military department to which the individual is assigned to duty, or towards the Secretary of the Treasury in time of peace if the individual is assigned to duty in the United States Coast Guard." Alternatively, Article 89's disrespect towards military superior officers could be redrafted to read "superior commissioned military officer or superior civilian official exercising military control over the accused."

In addition, there is another difficulty with the disciplinary theory as a constitutional foundation to support Article 88. It amounts to an equal protection argument: If the "disciplinary domino theory" is accurate—and the military could certainly say that it is, despite the linguistics in—

volved--then should not the provisions of Article 88 apply to all servicemen, regardless of rank? How can it be justified that Article 88 applies only to commissioned officers? Is that an example of the "too remote" theory in operation? Enlisted men, noncommissioned and petty officers, and warrant officers, are all subject to the same disciplinary requirements as commissioned officers. Thus if the disciplinary theory has any real validity, must it not apply to everyone? But since Congress specifically excluded enlisted men from Article 88 in the 1950 revision of the Articles of War, which resulted in the Uniform Code of Military Justice, does that make the disciplinary theory untenable?

All the above points could be used to make an equal protection argument against the validity of Article 88. On the other hand, there are numerous examples in military law where officers and enlisted men are treated differently. The most obvious example is Article 133 of the Uniform Code, which proscribes conduct "unbecoming" a commissioned officer, for which there is no comparable offense pertaining to enlisted men or warrant officers. Another significant difference is that enlisted men, noncommissioned officers, and warrant officers, may all be punished by the issuance of a bad conduct or dishonorable discharge as a sentence of a court-martial, if authorized for the conviction of the particular offense in question. 539 Commissioned officers, on the other hand, are "distince of the conviction of the particular offense in question.

<sup>539</sup>M.C.M., para. 126e. For a complete list of those

missed."540 Further, commissioned officers may be punitively dismissed upon conviction of any offense under the Uniform Code, if tried by a general court-martial--regardless of whether an enlisted man or warrant officer could be punitively discharged for committing the identical offense. 541 Moreover, there are even differences between certain kinds of commissioned officers, notably those contained in Article 67(b)(1) of the Uniform Code. That article requires automatic review of any conviction of a general or flag (meaning a Navy admiral) officer, regardless of the sentence imposed by the court. Other commissioned officers, and all enlisted men and warrant officers, only have the right to request the Court of Military Appeals to review their sentences, and then only if the sentence includes a punitive separation from the service or confinement for one year or more. (A death sentence is automatically reviewed, regardless of the rank of the offender.)

These examples illustrate that military law does not necessarily afford "equal" protection to officers and enlisted men. The simple fact is that everyone assumes that the rank structure demands some differences in treatment, and no one has ever seriously challenged that assumption. Thus it would

offenses for which the imposition of a punitive discharge is authorized upon conviction, see M.C.M., para. 127c.

<sup>540&</sup>lt;sub>M.C.M.</sub>, para. 126<u>d</u>.

<sup>541</sup> Id.

not necessarily be unconstitutional to proscribe disrespect by commissioned officers towards the President and certain civilian officials who exercise direct military control over that officer, and yet not impose similar proscriptions on enlisted personnel and warrant officers. Thus there is a strong argument that the disciplinary theory, even as applied to commissioned officers only, is constitutional.

Finally, mention should be made of a possible argument that the disciplinary theory could never sustain the constitutionality of Article 88. It is clear beyond question that Congress' intent in enacting Article 88 was the "man on a white horse" theory. Could then the disciplinary theory—one clearly not intended by Congress—ever sustain the validity of the article? Generally speaking, if statutes are constitutional under any theory, they will be sustained, even though the theory of the legislature which enacted them is itself an unconstitutional basis. 542

Notwithstanding, Article 88 as now drafted does not necessarily "fit" the disciplinary theory. The scope of the civilian officials covered by the article is too broad, and many of them cannot be justified as having any disciplinary relationship towards a military accused. Further, the disciplinary theory would be much more clear if the article applied to all servicemen, and not only to commissioned officers.

<sup>542</sup> See supra, n. 531.

Thus there are strong arguments to say that the article, <u>as</u> <u>now written</u>, is nothing but a sedition law directed against commissioned officers, and that it therefore violates the central meaning of the First Amendment.

(2) Disrespect Towards Superior Military Officers
Article 89 of the Uniform Code prohibits any serviceman from behaving "with disrespect" towards any superior military commissioned officer. Article 91(2) of the Code prohibits any warrant officer or enlisted man from treating a
superior warrant, noncommissioned, or petty officer, who is
in the execution of his office, "with contempt," as well as
prohibiting being "disrespectful in language or deportment"
towards them.

Paragraphs 168 and 170 of the Manual for CourtsMartial make it plain that the gist of these two offenses
is essentially the same, with a few technical differences:
If a commissioned officer is involved, that officer does
not have to be the direct superior (that is, in the military "chain of command") over the individual, and he does
not have to be "in the execution of his office" at the time
of the disrespectful behavior. Consequently, the Manual interprets these provisions in conjunction to mean that the disrespect does not have to occur in the physical presence of the
commissioned officer in question. 543 On the other hand, while

<sup>543&</sup>lt;sub>M.C.M.</sub>, para. 168.

warrant officers and noncommissioned or petty officers also do not have to be in the direct "chain of command" over the offender, the law does require that they be "in the execution of their office" at the time the disrespect occurs. (The phrase, "in the execution of his office," means that the individual must be engaged "in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage." <sup>544</sup>) The Manual interprets these provisions to constitute a requirement that any disrespect towards a warrant officer, or noncommissioned or petty officer, must be within the "sight or hearing" of the individual towards whom the disrespect is directed. <sup>545</sup>

Discounting these technical exceptions, it is clear that the nature of the offense in both articles involves speech. Indeed, the Manual discussion concerning the offense of disrespect towards superior commissioned officers 546 specifically states that the disrespect "may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual." 547 The same paragraph of the Manual goes on to say

<sup>544</sup> M.C.M., para. 169a.

<sup>545</sup> M.C.M., para. 170d.

<sup>546</sup> U.C.M.J., Art. 89.

<sup>547</sup> M.C.M., para. 169a.

Disrespect by words may be conveyed by opprobrious epithets or by other contemptuous or denunciatory language. Disrespect by acts may be exhibited in a variety of modes—as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer. 548

The discussion contained in paragraph 170a of the Manual, concerning the Article 91(2) offense, refers back to the language just quoted, and therefore makes it applicable to both the disrespect offenses concerned.

It should be apparent that the constitutional issues here involved are identical to those which have just been discussed concerning Article 88, and they need not be repeated here. However, it must be remembered that it was concluded that Article 88 was not constitutional on a disciplinary theory because of certain deficiencies. Do those same deficiencies exist with respect to Articles 89 and 91(2)?

The first difficulty with Article 88's validity on a disciplinary theory was that it can be applicable to cases of disrespect where no command relationship is involved.

That is clearly not the case with Articles 89 and 91(2). It also should be noted that the Manual discussion referred to previously specifically excludes from its proscriptions superior officers of a branch of the service different from that of the individual serviceman concerned—unless, of course, it is a joint command where an officer of one service has specifically been placed in direct command over members of other services.

The second infirmity in Article 88 was that it is applicable only to commissioned officers. No such infirmity exists concerning Articles 89 and 91(2). They apply to everyone subject to the Code, subject to the branch of service exception noted above. It could even be contended that the branch of service exclusion (except in the joint command situation) is not only reasonable but actually <u>supports</u> the disciplinary theory in this case. Discipline is demanded to insure obedience to orders. Those orders will, except in the case of a joint command, come from <u>within</u> the branch of service concerned. Thus the concept of discipline generally applies only within a particular branch of the service, not between branches.

Consequently, these articles do not suffer from the problems which Article 88 has, and they are therefore constitutional on the disciplinary theory.

- c. Maintenance of Good Order
- (1) Maintaining the Public Peace

The Uniform Code of Military Justice contains a number of articles which specifically relate to maintenance of the public peace. They include proscriptions against disorderly conduct, 549 breach of the peace, 550 "provoking" speech

<sup>549</sup>U.C.M.J., Art. 134.

<sup>550</sup> U.C.M.J., Art. 116.

or gestures, <sup>551</sup> communication of a threat, <sup>552</sup> and incitement either to riot or breach of the peace. <sup>553</sup> Mr. Emerson notes in his book <u>The System of Freedom of Expression</u> that such laws "arose from an ancient lineage not connected with First Amendment theory." <sup>554</sup> That comment seems particularly apt in relation to the military; indeed, research has failed to reveal any case where any First Amendment considerations have been applied by the Court of Military Appeals to any of these offenses.

Yet it is clear that each of these offenses can involve speech. One can be "disorderly" or commit a breach of the peace simply by loud speech. The other three listed offenses patently involve communication. Should all of these be protected speech within the meaning of the First Amendment?

While there are a number of relevant cases in this area, perhaps it will be instructive to begin with the central holding in Chaplinsky v. New Hampshire: 555

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been

<sup>&</sup>lt;sup>551</sup>u.C.M.J., Art. 117.

<sup>552</sup>U.C.M.J., Art. 134.

<sup>&</sup>lt;sup>553</sup>u.c.M.J., Art. 116.

<sup>554</sup> Emerson at 326.

<sup>&</sup>lt;sup>555</sup>315 U.S. 561 (1942).

thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 556

Although it is clear that certain portions of this passage from Chaplinsky are no longer valid, 557 the "insulting or 'fighting' words" portion of the case has never been overruled. Further, Mr. Emerson puts this sort of speech outside his system of freedom of expression and finds it more akin to action, especially when the speech takes the form of a personal insult delivered face-to-face. 558 He also would exclude incitement to riot, in the form of "shouted commands to a mob." 559

Using these tests, the military offenses of "provoking" speech or gestures and incitement to riot or breach of the peace would be outside the First Amendment's protections. In discussing the "provoking" speech or gestures offense, the Manual for Courts-Martial requires 560 that the conduct be in

<sup>556</sup> Id. at 571, 572.

<sup>557</sup> E.g., libel which is not "malicious" has been brought within the protections of the First Amendment by New York Times v. Sullivan, supra, n. 495.

<sup>558</sup> Emerson at 337.

<sup>559</sup> Emerson at 328.

<sup>560&</sup>lt;sub>M.C.M., para. 196.</sub>

the presence of the individual who is being "provoked," and that the provocation is that which would "tend to induce breaches of the peace." This definition is close to Chaplinsky's "fighting words" test, as well as falling within Mr. Emerson's theory of a "verbal act" which constituted "action" rather than "expression."

The military offense of communicating a threat, however, poses somewhat more difficult problems. The Manual for Courts-Martial says in part concerning it that

This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. The communication may be made to the person threatened or to another . . . It is not necessary, however, that the accused actually entertained the intention stated in the declaration . . . 561

Further, because the offense is lodged under Article 134 of the Code, there is the requirement that the conduct must either prejudice the good order and discipline of the military, or must bring discredit upon the military. What seems to be missing is any indication that the threat will induce the threatened individual to commit an offense. Thus it does not fit under <a href="Chaplinsky's">Chaplinsky's</a> "fighting words" concept, unless it could be said that the requirement that there must be a finding of prejudice to good order and discipline is tantamount to a requirement of a finding of some undesirable reaction on

<sup>561&</sup>lt;sub>M.C.M.</sub>, para. 213<u>f</u>(10).

the part of the threatened individual. Further, if the threatened individual were a civilian in no way connected with the military, it would appear that military order and discipline would not be involved, unless the offense occurred on a military reservation; additionally, as has been noted previously, conduct which merely "discredits" the military is insufficient for conviction, in light of O'Callahan v. Parker. 562 Thus it would appear that if a serviceman communicated a threat face-to-face to another serviceman, and if the court found that that communication tended to cause the threatened individual to react in a militarily undesirable manner, perhaps the offense is technically no different from the "provoking" speech or gestures offense and may therefore be constitutionally proscribed. But in other circumstances -- such as communicating a threat to a third person-the constitutional case is much weaker. The likelihood of direct harm to good order and discipline is remote. If the threat were actually carried out, that action could be punished. But in most situations other than the face-to-face case, it would appear that there are serious First Amendment difficulties with this offense. Notwithstanding, it must be remembered that there is no case which raises these problems, and perhaps even if they were raised the Court of Military Appeals would reject the arguments.

<sup>562</sup> See supra, n. 496.

Finally there remain the disorderly conduct and breach of the peace offenses, which are virtually indistinguishable when committed by speech alone. One suggestion is that such conduct could be equated to the production of sheer noise. Mr. Emerson equates heckling a speaker to the production of sheer noise and, as such, he finds it a verbal act which is not entitled to the protection which "expression" enjoys. 563 Especially in most military situations, where the breach of the peace or disorderly conduct would occur on a military reservation and disturb the crowded conditions which usually exist there, there should be no constitutional problem. major difficulty here is that frequently authorities use these offenses as excuses to cut off otherwise protected speech; even so, it is instructive to note that in none of the cases in which the Supreme Court has struck down a disorderly conduct or breach of the peace conviction on First Amendment grounds has the Court said that the statutes themselves are unconstitutional; all the Court has said is that, as applied to the set of facts before it, the conviction could not stand on First Amendment grounds. 564 Thus it would be possible that

<sup>563</sup> Emerson at 338.

<sup>564&</sup>lt;u>See</u> Cox v. Louisiana, 379 U.S. 536 (1965) (breach of the peace charge); Henry v. City of Rock Hill, 376 U.S. 776 (1964) (breach of the peace charge); Edwards v. South Carolina, 372 U.S. 229 (1963) (breach of the peace charge); Fields v. South Carolina, 375 U.S. 44 (1963) (breach of the peace charge); Feiner v. New York, 340 U.S. 315 (1951) (disorderly conduct charge); Terminiello v. Chicago, 337 U.S. 1 (1949) (disorderly conduct charge); Cantwell v. Connecticut, 310 U.S. 296 (1940) (inciting breach of the peace charge).

a military breach of the peace or disorderly conduct conviction might likewise be required to be set aside on First Amendment grounds; but this would not mean that the statutory provisions themselves are unconstitutional.

## (2) Criminal Libel

The model specifications in Appendix 6 to the Manual for Courts-Martial contain the only reference in military law to the offense of criminal libel, listing it as a violation of Article 134. The model specification reads:

<sup>&</sup>lt;sup>565</sup>Chaplinsky v. New Hampshire, 315 U.S. 561, 572 (1942).

In the		did, (at)		
on or a	bout	_ 19, wil	lfully, mal	iciously,
and wit	hout justifiab	le cause (c		
(publis	h) (circulate	among	) a	defamatory
stateme	nt in writing	concerning		, a
member	of the U.S. (A	rmy) (	),	(substantially)
as foll	ows:		•	

Since the offense falls under Article 134, it must be found in addition to the elements alleged above that the conduct prejudiced good order and discipline in the military, or that it brought discredit upon the military.

In his book <u>The System of Freedom of Expression</u>, Mr. Emerson comments that while most States have criminal libel laws, they are rarely invoked. The same is apparently true of the military jurisdiction, since there are only two cases of record before the Court of Military Appeals involving criminal libel.

The first of these is the 1957 decision in <u>United States</u>
v. <u>Grosso.</u> There the court did not discuss the nature of
the offense of criminal libel in any detail, although it did
find no error in the trial judge's refusal to instruct the
jury that truth would be a defense. The second case is the
1961 decision in <u>United States v. Brown.</u> Here the Court
did discuss the offense itself:

<sup>566</sup>Emerson at 389.

<sup>5677</sup> U.S.C.M.A. 566, 23 C.M.R. 30 (1957).

<sup>&</sup>lt;sup>568</sup>12 U.S.C.M.A. 368, 30 C.M.R. 368 (1961).

[C]riminal libel . . . is an offense which seeks to destroy the character and ruin the military standing of the victim of the statement . . . It is a crime which is particularly destructive of good order and discipline in the armed services, and it is one that is quite often used as a means of harassment to those who are seeking to carry out the military duties imposed on them. The offense has long been known and recognized by both military and civilian law . . . [T]he very essence of criminal libel is the defamation of an individual so as to deprive him of the benefits of public confidence. 569

cisions, the Supreme Court decided two cases involving State criminal libel laws, <u>Garrison v. Louisiana</u><sup>570</sup> and <u>Ashton v. Kentucky</u>. <sup>571</sup> While both cases raised the First Amendment issue, in <u>Ashton</u> the court did not reach it. Instead, the Court decided that the statute was void for vagueness. In <u>Garrison</u>, however, the Court equated criminal libel to civil libel and thereby extended the standard of <u>New York Times v</u>. <u>Sullivan</u> <sup>572</sup> to criminal libel—namely, that a conviction could stand only if the statements were made with knowledge of their falsity or with a reckless disregard of whether they were false.

There is no reason to believe that the Court of Military Appeals would not follow the rulings of the Supreme Court in the criminal libel area, were it presented with such a case.

<sup>56912</sup> U.S.C.M.A. at 371, 30 C.M.R. at 371.

<sup>570379</sup> U.S. 64 (1964).

<sup>571&</sup>lt;sub>384</sub> U.S. 195 (1966).

<sup>572376</sup> U.S. 255 (1964).

Thus the Court of Military Appeals' decision in the <u>Brown</u> case would be reversed if decided at the present, since under <u>Garrison</u> truth would indeed be a defense to a criminal libel charge.

Mr. Emerson reasons that to the extent that criminal libel laws involve statements against Government policies, institutions, or officials, they are in fact no different from the Sedition Act of 1798, which the Supreme Court has said was unconstitutional. The Secause the Sedition Act proscribed only false statements made with the intent to defame, the analogy seems correct, insofar as it applies to Government officials.

Mr. Emerson—and the three Justices who concurred in Garrison v. Louisiana on the same theory—would therefore hold that criminal libel laws are unconstitutional.

It is interesting to compare this reasoning with that of the Court of Military Appeals in the Brown case. There the court noted that the major purpose of the criminal libel offense in military law is to protect those who "are seeking to carry out the military duties imposed on them" from "harassment." In other words, it is to protect superiors from defamation by subordinates; and indeed, in both Grosso and Brown, the individual defamed was an officer and the accused was an enlisted man. Thus it could be said that if this is the pur-

<sup>573</sup> See supra, n. 495.

<sup>574&</sup>lt;sub>Emerson</sub> at 390, 391.

pose of the offense in military law, it is directly analogous to the Sedition Act of 1798. Further, one wonders why it is necessary, since the offense of disrespect towards superior officers would seem always to be available in any such case as this. Certainly if the disrespect were communicated to others in writing, all the factual requirements of the criminal libel offense could be made out as proof in a disrespect prosecution. Also, this would translate the offense into a strictly military context, which would remove any unconstitutional taint accompanying criminal libel.

It should be noted, however, that it is possible under the military offense of criminal libel for a superior to defame a subordinate, or for a serviceman to defame another serviceman of equal military rank. In this situation, the analogy to the 1798 Sedition Act is not as apt. Nor does there necessarily seem to be any other provision of the Uniform Code which could be used in lieu of the criminal libel offense. Perhaps actions by a superior against a subordinate could be called cruel or oppressive treatment within the meaning of Article 93; but mere written statements are not necessarily the same as "treatment." However, in the superior—toward-subordinate or equal rank situations, what could the function of the criminal libel offense be? The only use which comes to mind would be that involved in "good order and discipline" and probably best articulated as that conduct tending

to induce breaches of the peace by the defamed individual.

However, this purpose of a criminal libel statute was exactly the purpose of the criminal libel statute which the Supreme Court struck down in Ashton v. Kentucky. On the other hand, it must be conceded that military discipline is best achieved if the respect demanded by superiors from subordinates is reciprocal. Thus "good order and discipline" means more in the military than just preventing breaches of the peace, and to that extent the case is vastly different from Ashton.

Assuming that the Court of Military Appeals will follow the <u>Garrison v. Louisiana</u> decision and require deliberate falsehood or a reckless disregard for the truth, one would predict that the prosecutions for criminal libel in the military would be even fewer than the two cases of record which have reached the court in the past. However, it would also appear that it would be better to allege violations of Article 89 (disrespect to superior officers) or Article 93 (cruel and oppressive "treatment" of subordinates) whenever possible, and resort to the criminal libel offense only where no other alternative exists.

- d. Impairment of Loyalty, Discipline, or Morale
- (1) The Smith Act of 1940, 18 U.S.C. § 2387 (1970)
  This act makes it unlawful

for any person, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States--

(1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States: or

(2) to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.

The major cases in the civilian sphere concerning this statute have arisen in the context of dissent against the Government and its policies involving (usually) the conduct of war. The general trend of these cases, culminating in the supreme Court's 1966 decision in Bond v. Floyd, 575 is that general dissent and criticism of the Government's policies regarding the conduct of a war is constitutionally-protected speech. Other cases have arisen under other statutes prohibiting interference with the draft, 576 and they are therefore not really applicable to this discussion, since draftees are not yet servicemen and since the draft is essentially a civilian activity. 577 However, these decisions vividly demonstrate that sharp criticism of the war effort is constitution-

<sup>&</sup>lt;sup>575</sup>385 U.S. 116 (1966).

<sup>576</sup>Universal Military Training and Service Act, 50 U.S.C. App. § 462(a) (1970).

<sup>577</sup> See United States v. Spock, 416 F.2d 165 (1st Cir. 1969); Bagley v. United States, 136 F.2d 567 (5th Cir. 1943); Baxley v. United States, 134 F.2d 937 (4th Cir. 1943); Gara v. United States, 178 F.2d 38 (6th Cir. 1949), aff'd., 340 U.S. 857 (1950); Warren v. United States, 177 F.2d 596 (10th Cir. 1949), cert. denied, 338 U.S. 947 (1950).

ally protected. In addition, the First Circuit Court of Appeals' decision in <u>United States v. Spock</u><sup>578</sup> indicates that there is a line between criticism and advocacy of illegal action, and that the latter is not constitutionally protected.

Because criticism per se is constitutionally protected, Mr. Emerson concludes that statutes such as 18 U.S.C. \$ 2387 should be unconstitutional as well. Applying the traditional tests (clear and present danger, etc.) to the situation of pure criticism of the war effort, Mr. Emerson finds that the tests either cut off speech too or are otherwise generally inapplicable. Applying the expression-action concept, he concludes that criticism of Government policy is clearly "expression" and therefore should be protected speech. Specifically, he concludes that if this kind of speech "incites" violations of law, punishment of the violations themselves ought to be sufficient to cure the evil involved -- and if that kind of social remedy is insufficient, then punishment of the incitement would be insufficient as well. 579 These arguments and conclusions are cogent and appropriate when dealing only with criticism of a war--to include the draft and all other Government policies and actions in connection therewith. However, in relation to 18 U.S.C. § 2387, surely a different re-

<sup>&</sup>lt;sup>578</sup>416 F.2d 165 (1st Cir. 1969).

<sup>579</sup> Emerson at 73-75, 79.

Democrats in a letter dated 12 June 1863, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" Mr. Emerson specifically rejects this idea, opining that any limitations of this nature could lead to suppression of all opposition to the war. 581

The fact is that there is a clear difference in <a href="mailto:cizing">cizing</a> a war and in either causing or urging "insubordination, disloyalty, mutiny, or refusal of duty by any member of the military. . . . " The latter <a href="mailto:directly">directly</a> affect the internal operations of the military. To be specific, mutiny is an overthrow of military authority; insubordination and refusal to perform one's duty break down the entire operational structure of the military, as well as undermine discipline; and causing disloyalty destroys morale and discipline and thereby makes the effective operation of the military difficult if not impossible. Thus these activities are a far cry from general "criticism" of the war effort and they should not be treated as such. A military author has stated the problem thusly:

In the civilian community, the results of [a given] speech can be more leisurely examined and measured. In the military society, however, the need for a

<sup>580</sup> Ouoted in J. Nicolay and J. Hay, 7 Abraham Lincoln: A History 347 (1890).

<sup>581</sup> Emerson at 79.

strict discipline which provides instantaneous military response is ever attendant and presents a military necessity not present in the civilian situation. For example, a wildcat strike of short duration caused by an inflammatory speech has relatively mild, and basically economic, effects in civilian life. The offender cannot generally be restrained from speaking but can only be punished afterwards if his speech exceeded the court's determination of protected speech. However, the same action aboard a warship could have disastrous consequences. Further, the erosion of the discipline of the crew of such a vessel by inciteful or inflammatory speech cannot be allowed. To this degree, the "clear and present danger" element is present more often in a military situation than in a civilian one. 582

As has been noted before, Mr. Emerson himself excludes the military from his system of freedom of expression, thus limiting his system to the civilian sector. That is exactly the point here: This is the only statute which comes to mind where the civilian sector must conduct itself according to military standards; it is the only statute where the civilian sector is held to the military rule. What is really happening here is that the civilian sector is intruding into the business of the military sector, in that in this situation what it does directly effects military loyalty, morale, and discipline. Thus the standards applicable to these kinds of speech must be the standards applicable to the military, not to the civilian, sector. One may criticize the war effort to the limit; but directly intruding into the military's conduct of that effort by directly urging or causing what would

<sup>582</sup>Brown, <u>supra</u>, n. 518 at 88.

amount to a breakdown of the military itself is a different matter. Certainly this is a clear and cogent line to be drawn.

The Supreme Court seems to have recognized this difference. There is no indication that it has ever backed away from its decision in the case of Debs v. United States, 583 which is the earliest case to consider the predecessor statute to 18 U.S.C. § 2387. Of course there is the possibility that a civilian could speak or write in a manner prohibited by the statute and yet not be convicted; for example, an application of the clear and present danger test, or the incitement test, could indicate that the speech in question was so far from actually effecting any breakdown in military discipline that it should not be punished. On the other hand, if such a danger were clear and present, or if there were actual incitement, conviction would be warranted. Thus it could be that Eugene V. Debs would perhaps not be convicted under today's standards; but that does not mean that the principles incorated in 18 U.S.C. § 2387 are constitutionally wrong.

As the Vietnam War has engendered many controversies, one might expect that there would be contemporary prosecutions under 18 U.S.C. § 2387; yet none has been discovered within the civilian sector. It simply appears that most of the protest effort was directed against the draft, and not

<sup>&</sup>lt;sup>583</sup>249 U.S. 211 (1919).

against the military itself. However, it is interesting to note one prosecution under 18 U.S.C. § 2387 by a court-martial, the offense being incorporated into the Uniform Code through Article 134's assimilative provisions. The case is <u>United</u>

States v. Daniels. 584 A conviction handed down by the lower courts was reversed by the Court of Military Appeals because of a failure of the military judge to instruct on the clear and present danger test; however, the court's views of the constitutional aspects of the offense were set out in full.

Daniels was a recently-inducted member of the United States Marine Corps. He was stationed at a training center, from which most of the trainees would be sent to Vietnam.

Daniels was also a member of the Black Muslim faith. One day he told another Black Marine named Jones that he "shouldn't go" to Vietnam, because it was a "white man's war"; instead, Daniels told Jones he should stay in the United States and fight the "Black man's war against the whites." He also addressed two gatherings composed largely of Black inductees, making the same statements. He also proposed a group protest to the war by all the Black inductees' requesting "mast" (a naval term for office hours) on a particular day, at which they would all request not to be sent to Vietnam and to be discharged from the Marines immediately. There was evidence that Daniels had in mind that the mass action would somehow "force"

<sup>&</sup>lt;sup>584</sup>19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970).

the Marine Corps to grant the requests. Further, there was evidence that Daniels had discussed his personal views with his unit commander, who had advised to keep his views to himself because the commander knew that many of the inductees were not too happy to have been drafted.

and to create a clear and present danger of impairment of military loyalty and discipline. They cited Daniels' statements to Jones and those at the two mass meetings, and his suggestions for group action to secure release from going to Vietnam and his joinder of the Vietnam War with racial violence in the United States, as "not mere rhetoric or political hyperbole, but a call for refusal of duty." Thus it is clear that had the court found proper instructions to the jury, it would have sustained Daniels' conviction under 18 U.S.C. § 2387.

The court also briefly discussed the constitutional issue. In essence, it said that if the statements made by Daniels would fairly "constitute no more than commentary as to the tenets of his faith or declarations of private opinion as to the social and political state of the United States, he is guilty of no crime." 586 In other words, the court held that even as an inducted Marine Daniels had the right to

<sup>&</sup>lt;sup>585</sup>19 U.S.C.M.A. at 535, 42 C.M.R. at 137.

<sup>58619</sup> U.S.C.M.A. at 532, 42 C.M.R. at 134.

criticize United States policy on Vietnam; but when his comments went beyond fair comment and criticism and became a "call for refusal of duty," his speech was no longer constitutionally protected. Of course the constitutionality of a prosecution under 18 U.S.C. § 2387 is much more clear when the offender is a member of the military; that makes the entire context of the offense military. However, the military or civilian status of the speaker or writer is really irrelevant; the critical issue is whether his speech or writing constituted a clear and present danger to military loyalty, discipline, etc. Viewed in this light, there need be no constitutional infirmity in 18 U.S.C. § 2387, even when applied to a civilian.

One critic of the Court of Military Appeals has taken the court to task for its use of the clear and present danger test in this case. <sup>587</sup> Apparently appellate defense counsel had urged the court to apply the "bad tendency" test established in <u>Yates v. United States</u>, <sup>588</sup> perhaps more appropriate would have been a citation to <u>Gitlow v. New York</u>, <sup>589</sup> since <u>Yates</u> did not deal with the issues in so clear terms as did <u>Gitlow</u>. Notwithstanding, the Court of Military Appeals rejected the request and chose the clear and present danger test. Since the

<sup>587</sup> See supra, n. 534.

<sup>588</sup> See supra, n. 482.

<sup>&</sup>lt;sup>589</sup>268 U.S. 652 (1925).

"bad tendency" test appears to have been swallowed up by other tests, this does not appear unreasonable. However, what would the result have been had the other "standard" tests frequently employed by the Supreme Court been used by the Court of Military Appeals in <u>Daniels</u>?

The incitement test would require that Daniels' speech actually incite his hearers to some action. The facts in the case indicated that several individuals did join Daniels' call to the group "mast." While that was not illegal in itself, the court found that the purpose of the group action was to intimidate the Marine Corps into taking the action desired by Daniels, and that that intimidation was unlawful. Viewed in this light, the test is really no different from whether there was a clear and present danger involved in what Daniels did. And the same is true of the balancing test. There the issue on the Government side would be its interest in maintaining appropriate manning levels in Vietnam, based on its own decisions and not based on intimidation from within its ranks; the maintenance of good order and discipline on the installation; and general orderly administration, rather than determining early separations from the military service based on coercion. On Daniels' side, the issue would be his right to speak. But to make the scales fall one way or the other, one would almost have to determine whether Daniels' speech was a clear and present danger to the accomplishment of the Government's goals. Thus it appears again that in the disciplinary

area, the clear and present danger test is perhaps best to reflect accurately the interests at stake. Thus it is difficult to fault the Court of Military Appeals for applying it in this situation.

Accordingly, speech or writings in violation of 18 U.S.C. § 2387, where the action involved represents a clear and present danger to military loyalty, discipline, or morale, should not be constitutionally protected.

## (2) "Disloyal" Statements

Although Daniels was acquitted by the Court of Military Appeals of a violation of 18 U.S.C. § 2387, the court did find him guilty of a lesser-included military offense, also proscribed by Article 134 of the Uniform Code, named "disloyal statements." The model specifications in Appendix 6 to the Manual for Courts-Martial set out that offense as follows:

In that \_\_\_\_\_\_ did, (at) (on board) \_\_\_\_\_,
on or about \_\_\_\_\_ 19 \_\_, with design [to promote
(disloyalty) (disaffection) (disloyalty and disaffection)
among (the troops) (the civilian populace) (the troops
and the civilian populace) [ (interfere with) (impair)
the (loyalty,) (morale) (and) (discipline) of members of
the Armed Forces of the United States], utter to
\_\_\_\_\_\_ the following statement, to wit: "\_\_\_\_\_\_,"
or words to that effect, which statement was disloyal
to the United States.

The discussion of this offense as contained in paragraph 213<u>f</u>(5) of the Manual for Courts-Martial is very interesting:

Certain disloyal statements by military personnel may lack the necessary elements to consti-

tute an offense under 18 U.S.C. 88 2385, 2387, and 2388, but nevertheless, under the circumstances, be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces. Examples are utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.

The Court of Military Appeals has required that statements be disloyal only to the United States as such in order to fall within the proscriptions of this offense. Statements which are disloyal to a particular officer, <sup>590</sup> or to a particular branch of the military service (such as the Army), <sup>591</sup> are not disloyal to the United States nor can they be considered to be disloyal to the United States because they are in fact disloyal to any person or organization which is an officer of, representative of, or part of, the United States Government.

At the outset it should be said that O'Callahan v. Parker is relevant here, insofar as the model specification prohibits servicemen from promoting disloyalty and disaffection among the civilian populace. It is difficult to see how any such offense has a "service connection"; if the theory is that such conduct would be merely "discrediting" to the military, O'Callahan rejects that argument as well. 592 While these problems are

<sup>590</sup> United States v. Priest, 21 U.S.C.M.A. 64, 44 C.M.R. 118 (1971).

<sup>591&</sup>lt;u>Id.</u>; United States v. Gray, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970).

<sup>&</sup>lt;sup>592</sup>See supra, n. 496.

largely unresolved, at least it can be said that there is serious doubt that such conduct by a serviceman, involving only civilians, is an offense within the military court system, and it may not be an offense in the civilian courts either if a prosecution under 18 U.S.C. 88 2385, 2387, or 2388 would not lie.

On the other hand, if the disloyal statements are made with the specific intent--connotated by the word "design" in the model specification--either to "promote disloyalty or disaffection among the troops" or to "interfere with or impair the loyalty, morale, and discipline of members of the Armed Forces," a much different picture is presented.

In two early cases before military Boards of Review (both decided prior to the Supreme Court's 1953 Burns v. Wilson<sup>593</sup> decision and its subsequent impact on the constitutional rights of servicemen), the constitutional issue was never raised.<sup>594</sup> However, in a number of decisions, all arising as a result of the Vietnam War and all arising in a strictly intra-military context, the Court of Military Appeals has clearly decided the constitutional issue, at least insofar as it relates to disaffection and disloyalty within the military.

<sup>593346</sup> U.S. 137, pet. for rehearing denied, 346 U.S. 844 (1953).

<sup>594</sup> United States v. McQuaid, 5 C.M.R. 525 (ACM 4487), pet. denied, 2 U.S.C.M.A. 666, 5 C.M.R. 130 (1952); United States v. Gustafson, 5 C.M.R. 360 (CGCMS 19513, 1952).

One of the cases, <u>United States v. Harvey</u>, <sup>595</sup> was a companion case to the <u>Daniels</u> case, discussed immediately above. The facts in both were the same, except that Daniels was more the "leader" and therefore charged under 18 U.S.C. § 2387 rather than with disloyal statements under Article 134. Concerning a serviceman's right to speak his mind in general, the court's comments were:

Disagreement with or objection to, a policy of the Government is not necessarily indicative of disloyalty to the United States [citing New York Times v. Sullivan] . . . One can for example, protest the Selective Service System and urge its abolition without thereby being disloyal to the United States

Willful disobedience of an order, however important the order might be, does not necessarily constitute disloyalty to the United States . . . Disavowal . . . of particular orders is not the equivalent of disavowal of the allegiance owed to the United States as a political entity. 596

In <u>United States v. Gray</u>, 597 the court added these considerations:

A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant . . . [T]he public making of a statement disloyal to the United States, with the intent to promote disloyalty and disaffection among persons in the armed forces and under circumstances to the prejudice of good order and discipline is not speech protected by the First Amendment. 598

<sup>&</sup>lt;sup>595</sup>19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).

<sup>&</sup>lt;sup>596</sup>19 U.S.C.M.A. at 544, 42 C.M.R. at 146.

<sup>&</sup>lt;sup>597</sup>20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970).

<sup>&</sup>lt;sup>598</sup>20 U.S.C.M.A. at 66, 42 C.M.R. at 258.

What really seems to be the heart of the military view in this area was best said by a Court of Military Review in United States v. Levy: 599

[I]f one who has solemnly sworn to uphold the Constitution can promote by words the disaffection and disloyalty of others charged with the same duty, that which has been guaranteed would soon have no guarantors. 600

In all these situations, the Court of Military Appeals has relied on the clear and present danger test. It has been discussed above how it applied that test in <u>United States v. Daniels.</u> The <u>Harvey case was decided the same day as Daniels, and each refers to the other. It is clear that the court intended its discussion of the clear and present danger arising from Daniels' actions to apply to Harvey's as well, even though they were charged differently. <u>Gray</u>, decided later, also refers back to <u>Daniels</u> and <u>Harvey.</u> Further, the court has affirmed without opinion two other cases where a Court of Military Review applied the clear and present danger test to the facts. 601 Again it is unlikely that any other test would contribute more to the decision-making process to determine whe-</u>

<sup>59939</sup> C.M.R. 672 (CM 416463, 1968), pet. denied, 18 U.S.C.M.A. 627 (1969) [denial of petition for review not reported in Courts-Martial Reports].

<sup>60039</sup> C.M.R. at 678.

Mark & Stolte, 40 C.M.R. 730 (CM 418868), pet. denied, 40 C.M.R. 327 (1969) [U.S.C.M.A. cite not yet published].

ther particular speech was constitutionally-protected or whether it did indeed amount to unprotected speech in the form of a disloyal statement. Given the military's need for internal order and discipline and for high morale, it appears that this test best serves the interests of all concerned.

One disturbing fact about the disloyal statement offense is the Manual's bald statement that it may be proscribed even when the conduct would not violate 18 U.S.C. 88 2385, 2387, or 2388. It also is bothersome that the offense can be lesser-included within these offenses, should a prosecution charged under them (under Article 134) fail. The Court of Military Appeals addressed itself to this point in the Harvey case. First, it noted that the disloyal statement offense in military law predates the Espionage Act of 1917, where the first such proscriptions were enacted applicable to the public at large. Second, the court said it found no evidence that Congress intended to supersede military law by enacting the statutes concerned. It certainly is more important for the military to protect itself from diminution of loyalty, discipline, and morale from within its own ranks than from outside. Indeed, one of the reasons why Mr. Emerson would hold these laws unconstitutional is the relative difficulty which a civilian would have in communicating his views to a serviceman. 602 But surely that is not correct; servicemen still receive communi-

<sup>602</sup> Emerson at 79.

cations through the news media to the same extent as do other citizens; additionally, the "G.I. coffee house" which has emerged in recent years has as one of its major objectives the communication of information to servicemen. Thus the military is subject to the receipt of information from outside its ranks, as well as from within; and from whatever source, it must be protected from overt attempts to diminish its loyalty, discipline, and morale. The <a href="harm">harm</a> is the same, regardless of the source. Thus there is a clear <a href="military">military</a> necessity for statutes such as 18 U.S.C. § 2387; but that does not mean that there is no need for intra-military proscription as well.

Again, it must be remembered that the serviceman is subject to both civilian and military proscriptions, since he is both a citizen and a serviceman. But that dual role, and the dual jurisdiction of laws, certainly is not relevant to whether the laws are constitutional. This is the position which the Court of Military Appeals took in the <u>Harvey</u> case, and viewed properly it does not seem that that decision is objectionable.

- e. Prior Restraints on Speech
- (1) Specific Military Orders Imposing Restraints in Individual Cases

Because of the power of military superiors to give orders to subordinates, it is entirely possible that a prior restraint on speech could be imposed by the issuance of a direct order in that individual case, rather than through a formal censorship program such as that discussed above, which was established through a formal, generally-applicable directive. Two cases illustrate the problem.

In <u>United States v. Wysong</u>, 603 the propriety of Wysong's family's conduct on a military installation was the subject of a military investigation. Wysong, a serviceman, was ordered not to talk to anyone about the investigation. He did and was tried for disobeying the order. The Court of Military Appeals reversed the conviction, holding the order overbroad on First Amendment grounds. The court said "Unquestionably, the order severely restricted the accused's freedom of speech." 604

In contrast there is the civilian holding in <u>Goldwasser</u>

<u>v. Brown</u>. 605 Goldwasser was a civilian employee of the Air

Force, hired to teach English to foreign military officer

students, brought to the United States to attend Air Force

schools. In addition to teaching English, Goldwasser made

some remarks to his students, in the classroom, derogatory

to United States policy in Vietnam and to Jews. The remarks

came to the attention of his superiors, and he was directed

to refrain from such remarks and to "stick to teaching English."

However, he again made similar remarks and consequently was

<sup>6039</sup> U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

<sup>6049</sup> U.S.C.M.A. at 250, 26 C.M.R. at 30.

<sup>605417</sup> F.2d 1169 (D.C. Cir. 1969).

dismissed "for cause." He sued for reinstatement, claiming in part that his First Amendment rights were violated by the dismissal. The United States Court of Appeals for the District of Columbia Circuit upheld the dismissal. It held that even though a claim of "academic freedom" could be made, it was inapplicable since Goldwasser was hired to teach English, not to discuss current events, politics, sociology, etc. Further, what Goldwasser said was said during the actual performance of his duties and directly in conflict with express orders to the contrary. Distinguishing the case from Pickering v. Board of Education, 606 where the speech involved was made by a teacher outside the classroom, the court upheld the dismissal.

These cases illustrate the amorphous area where each specific order apparently abridging free speech must be tested on its own merits, rather than there being the possibility of formulating a general rule to say that a particular military offense (such as "disloyal" statements) in itself either violates or does not violate the First Amendment. Here only general principles must be used as guides to aid in solving each individual case. It is suggested the guides proposed by Professor Emerson concerning job-connected and non-job-connected speech, mentioned earlier, will be the most meaningful way to accomplish this.

<sup>606</sup> See supra, n. 419.

In Wysong, Wysong's speech had nothing to do with the way he performed his military duties; his speech related to the conduct of his family and an investigation incident there-In Goldwasser, however, the speech directly related to Goldwasser's job performance. What he said to the foreign officers after class would fall within his prerogatives as a citizen, to criticize his Government, its policies, or any ethnic group. But what he said in the actual performance of his duties was subject to greater restrictions. Then the question becomes whether the job-connected speech is still protected by the First Amendment. Mr. Emerson opines that if the restriction relates to a "management control" imposed to promote "internal harmony," it is not an unconstitutional "abridgement" of free speech. 607 Certainly a castigation of United States policy, to foreigners brought to the United States as a matter of that same policy, by one in an official teaching relationship to those students, does not promote "internal harmony." Further, after Goldwasser had specifically been directed not to make such comments, and he did so notwithstanding the specific order, certainly the Government had the right to impose appropriate disciplinary sanctions -even to the point of dismissal.

Thus it would appear that each case involving direct

<sup>607&</sup>lt;sub>Emerson</sub> at 570.

orders impinging on the full exercise of free speech must be analyzed on its own merits; and it is submitted that in the military, as well as in the civilian sector, the job-connected and non-job-connected concepts will be appropriate measures to perform that analytical task.

(2) Prior Restraints on the Distribution of Printed Material on Military Installations

Department of Defense Directive No. 1325.6, dated 12
September 1969, is entitled "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces."
Paragraph III.A. of the directive is worth quoting in full:

A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited. 2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made

to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

Each of the military services has implemented this regulation, with the general pattern being that final authority to prohibit distributions is retained at departmental level, rather than being left to the commander of the installation concerned, as the Department of Defense directive authorizes.

What this provision means is that, when locally implemented, an installation commander may require anyone desiring to distribute literature of any kind to submit that literature for prior "review"—or, in less favorable terms, for "censoring." It also should be noted that the use of the word "anyone" in the preceding sentence is correct; obviously the regulation in question would apply to military personnel, and it could be said that the commander's police power extends to anyone working on the installation. In addition, however, 18 U.S.C. § 1382 (1970) assimilates military installation regulations so as to make violations of them a Federal offense. Thus, when implemented locally, this directive applies even to a civilian not employed on the installation who desires to "handbill" there. This directly brings into question the constitutionality of the regulation itself.

The provisions of the Department of Defense directive just quoted are strikingly similar to those of a city ordinance considered by the Supreme Court in <u>Lovell v. Griffin</u> in 1938.<sup>609</sup> The city ordinance in question required anyone

<sup>608&</sup>lt;u>See</u> AR 210-10, 30 Sep. 1968, para. 5-5, <u>as changed</u> by Change No. 3, 1 Dec. 1970; AFR 30-1, 1 Aug. 1971, para. 14a, and AFR 35-12, 12 Jun. 1970, para. 3a; OPNAVINST 1620.1 (for the Navy).

<sup>609303</sup> U.S. 444 (1938).

desiring to distribute "circulars, handbills, advertising, or literature of any kind" first to secure the written permission of the City Manager. The Supreme Court unanimously held the ordinance invalid on its face as an unconstitutional prior restraint on free speech. However, the Court seemed to leave the door open slightly to imply that such an ordinance which served some valid Government purpose would be constitutional. Could the Department of Defense directive thus be distinguished from Lovell?

The Supreme Court has not yet considered a challenge to the Department of Defense directive in question, although a considerable number of cases has come before the lower Federal courts.

one of these cases directly related to the second numbered subparagraph in the quoted Department of Defense directive. 611 In that case, a civilian employee who admittedly was an active anti-war protester off the installation was barred from future entry onto the installation because anti-war literature was discovered in the trunk of her car. The court held that her exclusion not only equalled a dismissal from her employment but also that it was illegal because she had not attempted to distribute the material on the installation, and because mere possession of the literature was not prohibited.

<sup>610&</sup>lt;sub>303</sub> U.S. at 451.

<sup>611</sup> Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

Specifically, the court held that there was no evidence which could legally give rise to an inference that Kiiskila would engage in unauthorized distributions of literature on the installation, and the mere fear that she might make an unauthorized distribution was insufficient to bar her, absent sufficient evidence from which such an inference could be It also noted that there was no evidence that her presence on the installation had adversely affected military discipline, nor that her ability to perform her duties was in any way impaired by her off-post anti-war activities. Thus the court set aside the exclusion order. Two other cases were remanded for a rehearing because the lower Federal court had not made a full determination of the reasonableness of the military commander's finding that the material sought to be distributed would, in fact, present "a clear danger to the loyalty, discipline, or morale of military personnel."612 Another case involving a conviction under the United States Code provision cited above was reversed because the court found that the actual language of the installation regulation was not violated by the activities of the defendants. 613

But in Dash v. Commanding General, Fort Jackson, South

<sup>612</sup> Yahr v. Resor, 427 F.2d 346 (4th Cir. 1970); Overseas Media Corp. v. Resor, 385 F.2d 308 (D.C. Cir. 1967).

<sup>613&</sup>lt;sub>United</sub> States v. Bradley, 418 F.2d 688 (4th Cir. 1969).

Carolina, 614 the constitutionality of the Department of the Army's implementation of the Department of Defense directive, containing exactly the same standards as those quoted above, was challenged by the petitioner and specifically held constitutional by the court. In <u>Dash</u> the court found that there was a basis in fact upon which the commander could determine that the distribution in question would present a clear danger to loyalty, discipline, and morale of the command. Further, there was no suggestion by the court that the standard applied was unconstitutional. It also should be noted that in neither of the cases mentioned above, where the courts remanded the case for more evidence concerning whether the standard was in fact met, was there any hint by the court that the court considered the standard itself unconstitutional.

Two more recent cases are even more clear on this point.

In <u>United States v. Flower</u>, 615 Flower, a civilian, had been barred from future entry onto a military installation, under provisions of 18 U.S.C. § 1382 (1970), because he had made an unauthorized distribution of literature on the installation. Notwithstanding his exclusion, he re-entered, was arrested while again distributing literature without prior permission, and was convicted for his unauthorized re-entry.

<sup>614307</sup> F. Supp. 849 (D.S.C. 1969), aff'd., 429 F.2d 427 (4th Cir. 1970) (per curiam).

<sup>615452</sup> F.2d 80 (5th Cir. 1972).

He appealed to the Fifth Circuit on the theory that the regulation requiring prior approval to distribute literature on the installation was unconstitutional. The court held "that both the circumstances and the reasons in support of the regulation . . . pass Constitutional muster"; moreover, the court held that the regulation "established no unjustifiable prior restraint in violation of the First Amendment. We detect only a reasonable regulation promulgated in pursuance of an essential objective." 616

In <u>Schneider v. Laird</u>, 617 the Tenth Circuit was faced with an appeal from the denial of a request by a serviceman that he be granted an injunction prohibiting his installation commander from denying him permission to distribute an "underground" newspaper on the installation. The court concluded that the standards contained in the regulation are "without constitutional defects." 618

It should be noted that the holding of the court in <u>Dash</u> was that the commander indeed did have a basis in fact upon which he could determine that the distribution in question would present a clear danger to loyalty, discipline, and morale. In <u>Flower</u>, the court was even more clear in saying that

<sup>616</sup> Id. at 85.

<sup>617453</sup> F.2d 345 (10th Cir. 1972).

<sup>618</sup> Id. at 346.

no military commander has absolute authority to deny requests for permission to distribute literature on military installations. Instead, the commander is bound by the applicable standards, and in addition, "the courts may determine whether there is a reasonable basis for the restriction" imposed in any given case. The Tenth Circuit in Schneider v. Laird made a specific finding that the commander "acted reasonably and in accordance with" the regulation.

Thus it now appears well settled that the standards of the Department of Defense directive are constitutional, and the only question which will remain is whether a particular commander's decision amounted to a reasonable application of the standards, or whether it was arbitrary, unreasonable, or without foundation in fact.

It might be interesting to note at this point that there is a striking similarity between the standard of a "clear danger to loyalty, discipline, and morale" contained in the Department of Defense directive, and in the provisions of the Smith Act of 1940, 18 U.S.C. § 2387(2), quoted earlier. The Smith Act provision in question makes it unlawful:

for any person, with intent to interfere with, impair, or influence the loyalty, morale or discipline of the military or naval forces of the United States-

<sup>619452</sup> F.2d at 86.

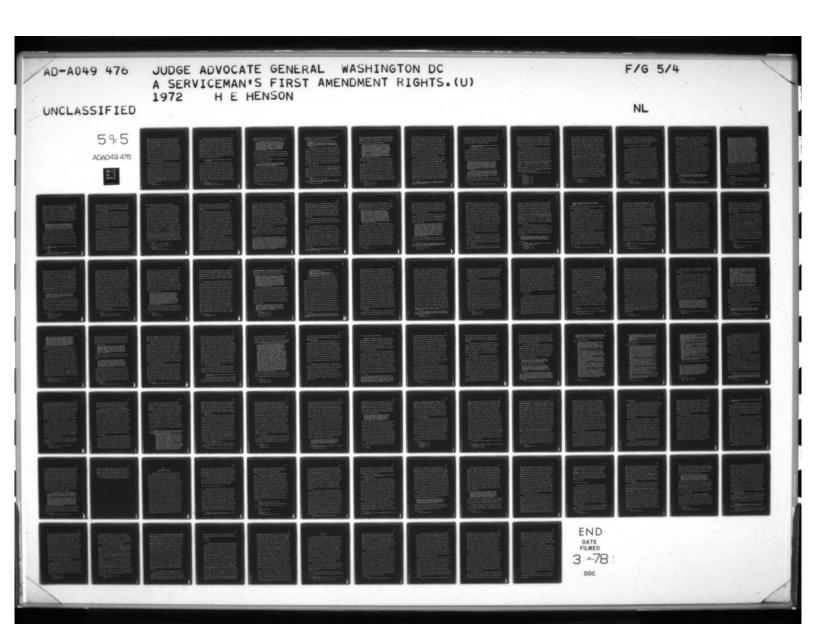
<sup>620&</sup>lt;sub>453</sub> F.2d at 347.

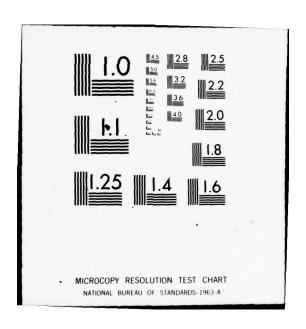
(2) to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.

The obvious difference between the provisions of the Department of Defense directive and the Smith Act section quoted is the question of intent: In the Smith Act offense, a specific intent must exist; in the administrative censoring situation, a prior review to prevent the same result is imposed. But in fact the military is accomplishing the same goal as that in the Smith Act section quoted, but by a means that prevents the harm from occurring, by a means that involves censoring, and by a means that is therefore easier to accomplish and enforce, especially in light of the Smith Act's specific intent provision. Does this make the decisions of the lower Federal courts, discussed immediately above, constitutionally incorrect?

When the Smith Act provision in question was discussed earlier, it was noted that this portion of the Smith Act holds the civilian community to a <u>military</u> standard. This is because what is really happening in these situations is that the civilian sector is intruding into the business of the military sector; what the civilian does directly affects the internal operations of the military. And the same is true with the regulatory scheme established by Department of Defense Directive No. 1325.6.

It also has been noted previously that the military





cannot afford to have a breakdown in loyalty, discipline, or morale. Thus it cannot afford the luxury of waiting until such a breakdown actually occurs before taking action; it must prevent the breakdown, if at all possible. If, then, there is indeed existent a "clear and present danger" in the writing desired to be distributed on the military installation, the needs of the military should allow the prior review of that writing, whether the distributor be a serviceman or a civilian. And it must be stressed that even the directive itself is clear that merely critical literature cannot be prohibited; only if it is determined that the material poses a clear danger to military loyalty, discipline, or morale may the distribution be prohibited.

Viewed in this light, the prior review provisions of the Department of Defense directive are not unconstitutional. It is true that they do establish a "permit system" based on the content of the material desired to be distributed; but given the needs of the military for the maintenance of good order, discipline, loyalty, and morale, such a review based on the appropriate test—the clear and present danger test—is not unconstitutional. These same considerations led the Fifth Circuit in <u>United States v. Flower</u> to say that the regulation "establish no unjustifiable prior restraint in violation of the First Amendment." 621

<sup>621452</sup> F.2d at 85.

Thus far in this discussion of distribution of literature, such distributions have been considered only on the basis of the contents of the literature itself—a "pure" free speech problem. Obviously involved is the physical act of distributing the literature. However, the Supreme Court has consistently treated that aspect of the situation in concert with problems involving the freedom of assembly and petition. Accordingly, the issues involved in the physical distribution aspect of "handbilling" on a military installation will be discussed below, in conjunction with the problems involved in assemblies on military installations. 622

(3) Prior Restraints on Symbolic Speech: Clothing Regulations

In discussing actions based on religious belief in Part III of this paper, it was noted that military uniform requirements prohibit the adoption of various modes of hair styles or certain "accoutrements" to the uniform, even if the individual serviceman desired to adopt those modes of appearance and dress for religious reasons. Although not expressly forbidden by the Department of Defense directive concerning political activities, 623 the wearing of a political campaign button on the uniform would also be prohibited by the standard concept of military uniform regulations. Both religious

<sup>622&</sup>lt;sub>See infra</sub>, pp. 389-397.

<sup>623&</sup>lt;sub>DOD</sub> Dir. 1344.10, 23 Sep. 1969.

and political devices would fall within the language of (for example) the Army regulation on the subject, which reads

No jewelry, watch chains, or similar civilian items will appear exposed on the uniform. The wear [sic] of a personal wrist watch, identification bracelet or ring is authorized as long as the style is conservative and in good taste. The wear [sic] of a purely religious medal on a chain around the neck is authorized as long as it is not exposed. The wear [sic] of a fad device, a vogue medallion, a personal talisman or amulet when in uniform or on duty is forbidden . . . . 624

What has been said previously concerning the factual uniformity of the uniform is applicable here as well, and there would be no unconstitutional "abridgement" of a serviceman's rights by these kinds of restriction.

However, the same paragraph of the just-quoted Army regulation continues as follows:

. . . Any item of personal wear that has disruptive, moral or social overtones whether basically an accepted item of wear may be declared an unauthorized item by the responsible unit commander.

This language poses a completely different problem, since it is in no way restricted to "when in uniform or on duty," and it therefore can be applied to civilian dress off duty as well. The Air Force regulation on the wearing of civilian clothing reads that the military commander may prohibit the wearing of certain types of civilian clothing on his installation based on "legal, moral, safety, or sanitary grounds which clearly correlate the military mission with the prohibited dress or

<sup>624</sup>AR 670-5, 18 Jan. 1971, para. 1-5.

appearance." 625 The regulation continues that specifically prohibited are items of civilian clothing which

(2) [contain] obscene, profane, or lascivious words or drawings

(3) might create a disorder because they reflect support of a country, organization, or individual who advocates or has advocated overthrow of the United States Government. 626

A common example of the type of clothing involved here is a short windbreaker-type jacket with a design or slogan emblazoned on it, usually across the back. Particularly in overseas areas where custom embroidering is inexpensive, elaborate designs and slogans appear on these jackets. The upshot of the regulations in question is that if these slogans were considered potentially "disruptive" to good order and discipline, or "immoral," they could be suppressed. Could the serviceman in question contend that he was constitutionally entitled to this form of expression?

This kind of expression is most analogous to the "symbolic speech" cases. For example, in <u>Stromberg v. California</u>, 627 decided in 1931, the display of a solid red-colored flag as a symbol of opposition to the Government was held to be protected expression. The wearing of black armbands in opposition to the Vietnam War was also held to be protected expression in the 1969

<sup>625</sup>AFR 30-16, 8 Nov. 1971, para. 1.

<sup>626</sup> Id. at para. 2a. Note: Navy provisions are contained in U.S. Navy Uniform Regulations, Ch. I, § 4, Art. 044.

<sup>627&</sup>lt;sub>238</sub> U.S. 359 (1931).

decision in <u>Tinker v. Des Moines Independent Community School</u>

<u>District.</u> 628 Further, the Supreme Court has held that even

if certain expression is highly disruptive, it may be nonetheless constitutionally-protected expression:

A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconventience, annoyance, or unrest. 629

Under these precedents, how can the military restrictions on the wear of civilian clothing, when not on duty, be valid?

It is submitted that the quotation from <u>Terminiello</u>

<u>v. Chicago</u>, immediately above, gives the clue: The prohibitions cannot be absolute; instead, they may be imposed only

if the military situation in question shows that they would

actually present a clear and present danger to good order and

discipline, or to morale, or to both. It has been noted be
fore in this section of the discussion that in the area of

good order and discipline, the traditional tests articulated

by the Supreme Court in First Amendment cases all resolve them
selves into the clear and present danger test, and the factors

<sup>628393</sup> U.S. 503 (1969).

<sup>629337</sup> U.S. at 3.

to be considered are most clearly stated by that test. Thus if the military commander could show that such a danger actually did exist, he could impose appropriate restrictions on civilian dress which amounted to "symbolic" speech—such as the embroidered windbreaker. He probably also could restrict the obscene—whatever that word means. Whether he could prohibit the profane is doubtful, since the Supreme Court's most recent decisions in the school prayer cases, for example, indicate that the Government should not be involved in religious matters—meaning that it should prohibit the profane no more than it should encourage the religious.

Accordingly, the language in the regulations in question must be read as giving the commander only the authority to impose the restrictions in question consistent with a serviceman's constitutional right to free speech. And, viewed in this light, these regulations become strikingly similar to those discussed immediately above concerning the distribution of literature on a military installation. To be sure, these clothing regulations do not require that the slogan on a jacket, for example, be submitted for review prior to its being worn on the installation; but the mere existence of the regulation prohibiting the wear of such clothing on the installation constitutes in itself a kind of restraint. However, if the commander

<sup>630</sup> See, e.g., School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 20J (1963); Engel v. Vitale, 370 U.S. 421 (1962).

could indeed show that the writing did constitute an actual, clear and present danger to the loyalty, discipline, or morale of his command, he could enforce the regulation by prohibiting the wear of the offensive clothing.

f. Conclusions Concerning Good Order and Discipline and Freedom of Speech

Like a <u>leitmotiv</u> running through a Wagnerian opera, the note of discipline runs throughout the entire discussion of a serviceman's rights under the First Amendment. Time and again it has been considered the justification for less freedom of speech for the serviceman, and indeed less freedom of religion as well. Further it runs throughout the entire concept of military law; for example, the Supreme Court has said in one opinion:

Traditionally, military justice has been a rough form of justice, emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual . . . .

Although the Court was speaking of military law in the sense of the court-martial system in the above passage, and although

<sup>631</sup> Reid v. Covert, 254 U.S. 1, 35-36, 38 (1957).

it could be argued that the Court was "loading the issue" to justify its decision in the case, nonetheless the quotation demonstrates the pervasiveness of the concept of discipline.

And, it follows, that which creates, nurtures, and fosters discipline—such as good order and high morale and loyalty—are treated synonymous with it.

And as is most clearly demonstrated in the distribution of literature cases in the lower Federal courts, the courts accept the military's need for discipline as a valid delineator justifying different treatment of servicemen than would be allowable in the case of a civilian. Only by accepting the need for discipline can the prior restraint provisions of Department of Defense Directive No. 1325.6 and such cases as <u>Dash v. Commanding General</u>, Fort Jackson, South Carolina, 632 United States v. Flower, 633 and Schneider v. Laird 634 be reconciled with the Supreme Court's decision in Lovell v. Griffin. 635 The same is true of clothing regulations and the Court's decision in <u>Tinker v. Des Moines Independent Community School District</u>. 636

However, it appears that the military cannot simply

<sup>632</sup> See supra, n. 614.

<sup>633</sup> See supra, n. 615.

<sup>634</sup> See supra, n. 617.

<sup>635</sup> See supra, n. 609.

<sup>636</sup> See supra, n. 628.

shout "Discipline:" and have the courts rule favorably on any restraint or "abridgement" of First Amendment freedoms which the military desires to impose. Instead, it appears that the clear and present danger test will most often be applied to determine whether expression can be restricted in the interests of military discipline. Further, it appears that this test is the one which most accurately reflects whether there is indeed a military necessity, in the name of discipline, for imposing the restrictions in question. And, as the decisions in Yahr v. Resor and Overseas Media Corporation v. Resor, 637 and particularly United States v. Flower, 638 amply demonstrate, the courts will not accept the military's conclusory statement that a particular form of expression will, in the military's opinion, harm discipline; rather, the courts will demand that the military actually prove that such a risk exists -- that, indeed, there is a clear and present danger to military discipline. In this fashion has the need for military discipline actually become assimilated into First Amendment theory; the impairment of discipline becomes a kind of "danger" which is simply nonexistent in the civilian sphere. And therefore its frequently successful invocation by the military to reduce a service-

<sup>637&</sup>lt;sub>See supra</sub>, n. 612.

<sup>638</sup> See supra, n. 615.

man's right to free speech—and sometimes a civilian's as well—below the level which civilians generally enjoy is not unconstitutional. The military need for discipline simply justifies more restraints in more factual contexts.

## B. A Serviceman's Right to Assembly and Petition

Vietnam war demonstrations—that is, for the entire history of the nation—public assemblies, demonstrations, parades, speeches, distribution of leaflets, canvassing—a multitude of public communications to a mass audience—have occurred. They were considered so important that the First Amendment specifically guarantees the free exercise of these activities in a peaceful manner. Yet because the issues frequently involved are unpopular—or conversely, because they are so very popular (but in any event, strongly held)—emotions run high and disorder frequently ensues. Thus these acts pose a special problem in First Amendment theory, and an equally special problem in relation to their exercise within the military.

As Professor Emerson points out in his book <u>The System of Freedom of Expression</u>, 639 development of First Amendment law concerning the right of assembly and petition did not commence until the late 1930's with <u>Hague v. C.I.O.</u> 640 and <u>Cant</u>-

<sup>639</sup> Emerson at 291.

<sup>640&</sup>lt;sub>307</sub> U.S. 496 (1939).

well v. Connecticut. 641 And even though a fairly large number of cases has come to the Supreme Court, particularly in the last few years because of the civil rights movement, the Court has failed to develop any comprehensive theory in this area, and even many basic issues remain unresolved.

Thus although the Supreme Court has not done so, it will be helpful first to exclude from First Amendment protection that conduct which should be called "action" rather than "expression." However, this is particularly difficult to do in the assembly and petition area since, as noted earlier, these acts always involve a communication plus some kind of physical action. Indeed, the Supreme Court has characterized them as "speech plus, the plus being physical activity that may implicate traffic and related matters." The Court has said in many cases that the "plus" aspects here involved may be regulated. However, before turning to that issue, a more fundamental issue is whether certain activity which might appear to fall within the category of protected assembly and petition should be removed from that category altogether.

Mr. Emerson draws the line as follows:

In general all forms of verbal communication customarily used in public assemblies must be classified as "expression." This would include speech,

<sup>641&</sup>lt;sub>310</sub> U.S. 296 (1940).

<sup>642</sup> Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 326 (1968) (italics in original).

writing, signs, singing, dramatic performances, the shouting of slogans, and the like. In addition, all nonverbal conduct that is an integral part of assembly would normally be considered "expression." This would include the holding of a meeting, marching, carrying signs, gestures, display of symbols, door-to-door canvassing, and similar conduct. Patrolling up and down or picketing would also constitute "expression" except insofar as it amounted to a signal for the exertion of organized economic pressure. The presence of people in the street or other open public place for the purpose of expression, even in large numbers, would also be deemed part of the "expression."

On the other hand, the use of physical force or violence, against person or property, would be considered "action." A sit-in, lie-in, or chain-in, in which the physical occupation of territory is used as a form of pressure, would normally constitute "action." So would the obstruction of traffic, or obstruction of ingress or egress, when undertaken for the purpose of physical interference. Disruption of a meeting by moving about or making noise must also be counted as "action." Likewise, wearing of masks or uniforms under circumstances implying the use of force or violence would be put in the same category. Some conduct of a purely verbal nature, such as the issuance of a command or directions to engage in violence, would also come within the definition of "action." 643

Thus any attempt by a group to occupy a building on a military installation, to make a human "chain" to prohibit the moving of men or equipment, and similar actions, are not constitutionally protected. What about those forms of assembly and petition which are "expression" and therefore do fall within the protections of the First Amendment?

## 1. Assembly

The provisions of Department of Defense Directive No. 1325.6, as they are applicable to distributing literature on

<sup>643&</sup>lt;sub>Emerson</sub> at 293, 294.

military installations, have been set out earlier. There the problem was that the military could review the <u>contents</u> of the literature and suppress its distribution if the <u>contents</u> presented a "clear danger" to military discipline, loyalty, or morale. However, the paragraph continues that the physical act of the distribution itself can be prohibited "if the distribution of the publication would materially interfere with the accomplishment of a military mission. The same directive also contains a special paragraph dealing with assemblies:

On-Post Demonstrations and Similar Activities. The Commander of a military installation shall prohibit any demonstration or activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops . . . 646

To the extent that "handbilling" is a form of assembly, it would fairly appear to fall within the "similar activities" phrase in the above-quoted paragraph. 647 Thus the act of distributing handbills could be prohibited, even if the contents of the handbill did not present a clear danger to the loyalty, discipline, or morale of the troops, if the act of distributing would itself present such a danger. Similarly,

<sup>644</sup> DoD Dir. 1325.6, 12 Sep. 1969, para. III.A.1.; discussed supra, pp. 370-379.

<sup>645</sup> Id.

<sup>646</sup> Id., para. III.E.

<sup>647</sup> Accord: Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968).

demonstrations, "handbilling," and all other forms of assembly could be prohibited on the additional basis that the act would materially interfere with the "orderly accomplishment" of the military mission.

It is interesting to note that while the provisions of Department of Defense Directive No. 1325.6 require a submission of literature for review prior to distribution, there is no similar requirement in the assembly portion of the requirement that would in effect require securing a permit to conduct an assembly on the installation. Instead, the requirement is that demonstrations or similar activities shall be prohibited, if the danger or interference with the military mission is found to exist.

On the other hand, a fair reading of the Department of Defense directive would imply that if the assembly in question did not present a clear danger to loyalty, discipline, or morale of the troops, or if it did not materially interfere with the orderly accomplishment of the military mission, the commander concerned would be required to allow the assembly to be held. In constitutional terms, assuming for the moment that the standards by which the assembly could be prohibited are constitutional, if those standards were not present the commander would be constitutionally required to allow the assembly to occur. But how could those determinations be made; particularly, how could the participants ascertain whether

their assembly would be permitted or prohibited?

The obvious answer is that they would apply for permission to conduct the assembly, just as they would apply to distribute literature on the installation. And, although it is clear that a request for permission to conduct an assembly is not a procedure required by the Department of Defense directive, it is in fact what has evolved. The Air Force regulations implementing the Department of Defense directive specifically spell this out; 648 the other services' regulations do not. The Army regulation, however, implies that a request for permission may be submitted and may be granted in appropriate circumstances. In pertinent part, the Army regulation reads "Participation in picket lines or any other public demonstrations, . . . not sanctioned by competent authority, is prohibited . . . "649 The evolution of this permission system in actual practice is illustrated by Dash v. Commanding General, Fort Jackson, South Carolina 650 and The Committee to Free The Fort Dix 38 v. Collins, 651 in both of which there had been submitted a request for permission to conduct an assembly on the Army installations concerned. Thus

<sup>648</sup> AFR 35-15, 12 Jun. 1970, para. 3.

<sup>649</sup>AR 600-20, 28 Apr. 1971, para. 5-16.

<sup>650</sup> See supra, n. 614.

<sup>651429</sup> F.2d 807 (3d Cir. 1970).

it appears that as a matter of practice the services have chosen to implement the Department of Defense directive by a permit system, based on the standards contained in the directive.

Everything that has been said previously about the maintenance of good order and discipline in the military, and the creation of morale, applies to this situation and need not be repeated. To the extent that the military can indeed show—and it clearly bears the burden of proof—that a clear and present danger to military loyalty, discipline, or morale would accrue from the assembly or distribution in question, it would be constitutional for the military to deny permission to conduct the assembly on the installation. In addition, permission can be denied on the basis that there would be a material interference with the orderly accomplishment of the military mission of the installation concerned. Is this constitutional as a basis for denying permission to conduct assemblies on military installations?

This standard harks back to the notion that the military must always be prepared for the accomplishment of its ultimate task, the defense of the nation. If the "every day is the potential day of war" concept were applied in this case to the fullest extent, the military could conceivably deny all requests for permission to conduct a peaceable assembly on a military installation. It could argue that the mere impeding

of traffic, the use of military police to insure order, and other administrative necessities could hinder its military readiness. However, this argument goes too far; the military does other things—such as an official parade or other ceremony—which take individuals away from their strictly military—preparedness duties and which themselves create traffic impediments. Further it is submitted that the word "materially" in the Department of Defense directive 652 imports exactly this concept. Thus if the military can prove a "material" interference with the accomplishment of its mission, that should be a constitutional basis to refuse the request for permission to hold an assembly. But, again, it must be stressed that the burden of proof rests with the military.

Additionally, clearly insofar as servicemen themselves are concerned, the material interference with the orderly accomplishment of the military mission is a distinctly job-connected standard. Certainly no one would say that an em-

<sup>652</sup>It should be noted that the word "material" is used to modify the word "interference" in para. III.A., DoD Dir. 1325.6, which relates to distributions of literature on military installations. However, the word "material" does not appear as a modifier to the word "interference" in para. III.E. of the same directive, which relates to on-post demonstrations and assemblies. This omission is deemed an oversight by the drafters, since there is no logical or legal reason why the two situations should or would be treated differently. Since any interference would be too broad a standard, at least in relation to restricting First Amendment rights, it will be presumed that the intent was to establish the standard of a "material interference" in both paragraphs.

ployee ought to be able to prevent the business of Government from being accomplished by his material interference. Of course there always will be <u>some</u> interference with complete calm and order in any assembly situation; it is endemic. But balancing that inherent disruption against a material interference, when the individuals concerned are employees, indicates that a restriction against such material interference is warranted.

Thus the standards established by the Department of Defense directive are constitutional limitations on the rights of those seeking to conduct assemblies on a military installation.

It is interesting to note an additional matter.

In a long line of cases, the Supreme Court has held that constitutionally-permissible restrictions on the right of assembly can be imposed insofar as they relate to the "time, place, and manner" of the physical aspects of the assembly-the "plus" aspect of the assembly. However, neither the Department of Defense directive concerning assemblies and distributions nor any of the services' implementing regulations discusses this aspect of the problem. It is apparent that should unreasonable restrictions be imposed, in the guise of "time, place, and manner," the meaningfulness of an assembly

<sup>653&</sup>lt;u>See, e.q.</u>, Martin v. Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

which admittedly does <u>not</u> meet the limiting standards of the Department of Defense directive could be seriously curtailed. But further to complicate the issue, it is not entirely clear exactly what the phrase "time, place, and manner" means:

Presumably [the "time, place, and manner" standard] would include restrictions with respect to place and regulations required in the allocation of physical facilities. Presumably it also covers certain general police regulations, not related to control of expression, such as a general curfew or a physical isolation of persons with communicable diseases . . . Such restrictions have no bearing upon the maintenance of a system of freedom of expression [and are therefore constitutional]. If "time, place and manner" is to mean more than this, however, it would probably be inconsistent with the full protection theory. 654

An example in the author's experience will point out the difficulties involved here. A soldier requested permission to distribute a leaflet containing a quotation from the Declaration of Independence. Permission to make the distribution was ultimately granted, but the distribution was limited (1) to a distribution by the requestor alone; (2) to a two-hour period of time on a designated Sunday afternoon; (3) to a particular parking lot area adjacent to the main Post Exchange; and (4) the permission carried an injunction that the individual would be personally responsible for the "police" of the area—that military word meaning, in this context, that the individual would be responsible to clear up any littering that occurred

<sup>654</sup> Emerson at 353.

by others dropping his leaflets on the ground after he gave them away. The first three of the restrictions imposed appear "reasonable" under the military circumstances involved; in any event, the reasonableness of the restrictions and the chilling effect they may have on the distribution itself will always remain open questions.

Concerning the fourth restriction, however, there is somewhat a more difficult question. In <u>Schneider v. State</u>, 656 the Supreme Court appeared to announce a principle that "handbilling" could not be prevented because the <u>recipients</u> of the handbills might litter:

We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets. 657

On the other hand, the <u>Schneider</u> factual situation was not limited to a rather small area; thus to hold the individual

<sup>655</sup>For a serviceman's quite uncomplimentary view of this incident, see J. Dippel, Getting Nowhere through Channels, 164 The New Republic, 22 May 1971, at 13-17.

<sup>656&</sup>lt;sub>308</sub> U.S. 147 (1939).

<sup>657</sup> Id. at 162.

"handbilling" responsible for the cleanliness of an entire street or downtown area would indeed be unreasonable. But when, as in the military case here in question, the distribution is limited to a clearly definable and rather small area, the condition that the individual "handbilling" clean up does not seem so onerous as to make the requirement unconstitutional. Notwithstanding, it somehow seems unfair to impose such a requirement on the individual making the distribution, since by "handbilling" he is only exercising his constitutional privilege; no one would contend that those actually littering have any constitutional right to litter. Since the distributor is not littering, it somehow seems punitive to hold him responsible for what others illegally do. However, the test appears to be what is reasonable, and not what seems "unfair"; thus it might well be that even the clean-up requirement would--under the limited circumstances posed--be constitutional.

The principle which emerges is that, even on military installations, <u>reasonable</u> restrictions as to "time, place, and manner" of the physical aspects of assemblies may be imposed. The question will always remain, of course, whether under any given circumstances the restrictions imposed were indeed reasonable.

To this point, there appears to be no serious difficulty with the military application of constitutional prinassemblies on a military installation. The Department of Defense directive's standards which the courts have upheld in the context of the distribution of literature cases 658 are analogous to the standards applied to an assembly case. Certainly in the two actual assembly cases mentioned, particularly in Dash v. Commanding General, Fort Jackson, South Carolina 659 and, to a lesser extent in The Committee to Free The Fort Dix 38 v. Collins, 660 the courts virtually assumed the standards to be constitutional. Similarly, a reasonable application of the "time, place, and manner" limitation would be constitutional.

Some disturbing problems still remain, however.

The first is that in addition to controlling the First Amendment assembly activities of servicemen on military installations, the Department of Defense directive quoted above also purports to control those rights off military installations as well:

Off-Post Demonstrations by Members. Members of the Armed Forces are prohibited from participating in off-post demonstrations when they are on duty, or in a foreign country, or when their activities con-

<sup>658</sup> See, e.q., Yahr v. Resor, supra, n. 612; United States v. Bradley, supra, n. 613.

<sup>659</sup> See supra, n. 614.

<sup>660</sup> See supra, n. 651.

However invalid these restrictions may appear at first glance, a more detailed study is required.

The first restriction is "when they are on duty." Certainly nothing could be more job-connected as that term has been used herein than a serviceman being "on duty." An example would be a military truck driver, driving on a military errand off post in a military vehicle, who stops in order to participate in an off-post assembly. In fact, the mere act of stopping would probably violate Article 86 of the Uniform Code of Military Justice, in that the serviceman would be deviating from his route and therefore he would fail to go to the place to which he had been directed at the time prescribed. Thus there is no unconstitutional "abridgement" in this portion of the prohibitions involved.

Likewise there seems to be no difficulty with the restriction that servicemen not participate in off-post demonstrations "in a foreign country." In the first place, servicemen are usually sent to foreign countries by the Government to perform military duties there. As such, the servicemen is virtually an "instrument" of American foreign policy. Thus restrictions on his actions are reasonable. An interest-

<sup>661</sup>DOD Dir. 1325.6, 12 Sep. 1969, para. III.F.

ing analogy arises from <u>Frend v. United States.</u> 662 There a prohibition against conducting a demonstration within 500 feet of a foreign embassy in Washington, D.C., was upheld as a valid restriction in order to protect the foreign ambassador and his staff from embarrassing disturbances which might also jeopardize United States relations with the foreign government involved. Mr. Emerson believes the restriction in <u>Frend</u> constitutional, "but only on the theory that the embassy was in effect foreign territory and hence outside the American system of freedom of expression." 663 Thus Mr. Emerson would in effect say that the First Amendment does not apply to demonstrations conducted by Americans in a civilian community in a foreign country.

At first glance, this is difficult to reconcile with the principles which controlled in <u>Best v. United States</u>. 664

There the court assumed that the Fourth Amendment applied to the unlawful search and seizure of an American's personal property by American authorities in occupied foreign territory. If the Fourth Amendment applies overseas as in <u>Best</u>, why does not the First Amendment? It is submitted that the difference is that, in a situation like <u>Best</u>, the United

<sup>662100</sup> F.2d 691 (D.C. Cir.), cert. denied, 312 U.S. 640 (1938).

<sup>663100</sup> F.2d at 258.

<sup>664184</sup> F.2d 131 (1st cir. 1950).

States itself is the motivating power involved -- that is, the United States conducted an illegal search. In such cases, the courts will not permit the Government to act contrary to the Constitution. However, in the case of an off-post demonstration overseas, the restrictions imposed do not arise from the conduct of the United States. Rather, they arise because the individual acts independently, in that he desires to participate in an off-post demonstration in a foreign country. There is no "government action" involved in that situation, as there is in a search conducted by Government agents. Further, in the search case, only the United States and one of its nationals are involved; in a sense, the problem is strictly "domestic" (even though it factually occurs overseas). On the other hand, participation by a serviceman in an off-post demonstration overseas is by definition not "domestic"; rather it is both public and "foreign" as well. It in no wise involves the United States as a participant; to the extent that the United States is involved, only its foreign relations could arguably be affected. However, as noted above, servicemen stationed overseas are virtually "instruments" of United States foreign policy. The United States always has the right to control its foreign relations and, if necessary, to impose restrictions on citizens in furtherance thereof-such as its authority to invalidate passports for travel to certain foreign countries, in the interests of United States

foreign policy. 665 Certainly when the individual is an "instrument" of foreign policy, even greater restrictions may be imposed on him. These factors distinguish the situation from Best. Accordingly, it does not appear that a serviceman's rights are violated by the restriction in the Department of Defense directive.

The third and fourth restrictions are "when their activities constitute a breach of law and order, or when violence is likely to result." These pose more troublesome constitutional problems. In the first place, the physical place concerned is one off a military installation. Under the Supreme Court's decision in O'Callahan v. Parker, 666 the military has no jurisdiction over offenses committed off a military installation by servicemen unless those offenses are "service-connected." Even if the assembly in question were in protest of, say, the Vietnam war, it would seem that that fact alone would be insufficient to make a participating serviceman's conduct "service-connected." Thus, if the serviceman did break the peace during the assembly, or if violence did occur, those would be unquestionably civilian matters, not military.

Additionally, these restrictions raise the entire thorny

<sup>665</sup> Zemel v. Rusk, 381 U.S. 1 (1965).

<sup>666</sup> See supra, n. 420.

problem of when and how assemblies can be prohibited because of possible disorder or violence. At least one principle can be stated which is directly applicable to the Department of Defense directive in this regard: Kunz v. New York 667 specifically holds that a permit to conduct an assembly cannot be denied simply on the fear, belief, or possibility that disorder and violence might occur. The only case where the Supreme Court has ever upheld an injunction against an assembly (there a labor strike) was Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc. 668 The facts there showed a history of immediately-prior events involving the same union where considerable violence had in fact occurred. As the court said,

The picketing in this case was set in a background of violence. In such a setting it could be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. 669

Thus, when there is such a prior history, a serviceman (like a civilian) might be prohibited from joining an off-post demonstration; but even so, it would appear that such would properly be the function of the <u>civilian</u> jurisdiction involved and not the military—and in no case should the prohibition be imposed because of the mere possibility that violence might occur.

Finally there is the restriction imposed by the Depart-

<sup>667340</sup> U.S. 290, 294 (1951).

<sup>668&</sup>lt;sub>312</sub> U.S. 287 (1941).

<sup>669</sup> Id. at 294.

ment of Defense directive that servicemen cannot participate in off-post assemblies "when they are in uniform." The Army regulation states that the reason for this (and for the other prohibitions as well, for that matter) is that participation by servicemen "may imply [military] sanction of the cause for which the demonstration is conducted."670 Certainly the uniform restriction is valid to accomplish this purpose, particularly in view of the constitutional scheme that the civilian government should control the military, and not vice-versa. Additionally, this prohibition is the only one here involved which has specifically been considered by the courts. Locks v. Laird<sup>671</sup> the plaintiff Locks, a serviceman in the Air Force, had been convicted by a general court-martial for wearing his uniform in an off-post assembly opposing United States troop employment in Vietnam. The offense was charged as a violation of the Air Force's regulation implementing the Department of Defense directive here under consideration. The court held the regulation constitutional, on the theory that a serviceman had no constitutional right to wear the uniform whenever he pleases, since the uniform "belongs" to the military and not to the individual.

Locks made an interesting claim which is worthy of more

<sup>670</sup>AR 600-20, 28 Apr. 1971, para. 5-16.

<sup>671300</sup> F. Supp. 915 (N.D. Cal. 1969).

detailed note. He claimed that wearing the uniform in the particular context equalled "symbolic speech," which was a much more effective means to communicate his views against United States troop employment in Vietnam than if he had participated in the demonstration not wearing his uniform.

The court ruled that this was in effect a perversion of the uniform, since the very essence of the uniform is its symbolism of unity and the membership of the individual in his military branch of service, and his "participation, allegiance, and achievement" in his military capacity. Further, the court ruled that to allow the serviceman to wear his uniform at such a public assembly

cannot help but have <u>some</u> adverse and detrimental effect on the loyalty, discipline, morale, and efficiency of the Armed Forces. To conclude it could not have such an adverse effect is unreasonable. The extent of such adverse effect this court need not decide, once it determines, as it does, that <u>some</u> adverse effect could be reasonably expected to follow. The basic responsibility of determining what constitutes "for the good of the service" when it involves assigning significance to military symbols, is more a military decision than it is a judicial one and hence should be approached by the courts with caution. 673

What is interesting about this portion of the <u>Locks</u> decision is that the court took the standards which the Department of Defense directive sets out concerning holding <u>on-post</u> assem-

<sup>672</sup> Id. at 919.

<sup>673</sup> Id. at 919-920.

blies and applied them to <u>off-post</u> assemblies. Notwithstanding, the logic that the uniform "belongs" to the military rather than to the individual, and that the military therefore may prescribe its wear or prohibit its wear, is unquestionably sound when applied to one who is actually a serviceman.

Considering the Department of Defense directive's restrictions on off-post assemblies by servicemen as a whole, it would appear that they are for the most part valid, the doubtful provisions being those relating to prohibiting participation "when their activities constitute a breach of law and order, or when violence is likely to result." Further, from the valid proscriptions set forth, one can establish some positive situations where servicemen may participate in off-post demonstrations, even if they protest an activity or policy of Government which directly affects the military: They may participate without military permission, when in the United States, off a military installation, off duty, and in civilian clothes. For example, in United States v. Howe, 674 discussed many times previously, Lieutenant Howe was in the United States, off the installation, off duty, and in civilian clothes -- and there were no charges against him for participating in the assembly in question. In Dash

<sup>674&</sup>lt;sub>See supra</sub>, n. 508.

v. Commanding General, Fort Jackson, South Carolina, 675 the court upheld the denial of permission to conduct an anti-war demonstration on the post; yet the court also said

Off base, as parts of the great mass of our nation's citizenry, they may well be entitled to First Amendment rights, they should no doubt be granted the right of all other citizens to exercise the freedom to dissent and to criticize . . . They sought to generate, through their meeting, such discontent with the Vietnam war among servicemen that the political decision to involve this nation in such a war might be influenced, if not reversed. This they may have a constitutional right to do off base and as individual citizens, despite the fact that they were members of the armed services. 676

It has been noted that the <u>Locks v. Laird</u><sup>677</sup> decision assimilated the standards applicable to on-post demonstrations to the rights of servicemen to participate in off-post assemblies. This leads to the second disturbing problem which should be discussed. The Army, in implementing the provisions of the Department of Defense directive which have been the topic of discussion in this section has, like the <u>Locks</u> court, blurred the concepts involved. The pertinent Army regulation reads as follows:

Participation in picket lines or any other public demonstration, including those pertaining to civil rights, may imply Army sanction of the cause for which the demonstration is conducted. Such participation by members of the Army, not sanctioned by competent authority, is prohibited—

<sup>675</sup> See supra, n. 614.

<sup>676307</sup> F. Supp. at 856-857.

<sup>677</sup> See supra, n. 671.

- a. During the hours they are required to be present for duty.
- b. When they are in uniform.
- c. When they are on a military reservation.
- d. When they are in a foreign country.
- e. When their activities constitute a breach of law and order.
- f. When violence is reasonably likely to result. 678

The glaring problem with this regulation is that it makes no distinction between on-post and off-post assemblies. The Department of Defense directive does not make applicable to on-post assemblies any of the restrictions listed in the Army regulation, except the one provision concerning participation on the installation (subparagraph "c" in the Army regulation). While it is clear that on-post assemblies could be restricted in many of the ways listed on a "time, place, and manner" basis, those standards change as the circumstances change. Thus to prohibit all on-post assemblies while in uniform or during duty hours may so restrict the privilege as to nullify it altogether. For example, an oversea commander could -- with complete justification -- read the quoted Army regulation to require that all assemblies in a foreign country could be prohibited; thus he would feel obligated, by order of the Secretary of the Army, to deny any request for an assembly on his oversea installation. This obviously is not correct; the Department of Defense directive prohibits only over-

<sup>678</sup> AR 600-20, 28 Apr. 1971, para. 5-16; repeated in essentially the same wording in AR 600-21, 18 May 1965, para. 9. Latter citation refers to civil rights demonstrations exclusively.

seas off-post assemblies. Thus an on-post assembly, overseas or in the United States, is permitted -- if it does not offend the standards set out concerning loyalty, discipline, morale, or the accomplishment of the military mission. This leads to the second glaring problem in the Army regulation: The standards by which the commander concerned may grant or deny permission to conduct on-post assemblies are completely omitted from the Army regulation. Thus the Army commander is left without any standards whatsoever upon which to base a decision, should he receive a request to permit an on-post assembly. Particularly is this critical when it is considered that Department of Defense directives are usually not distributed to lower commands, and therefore those lower commands must rely solely on whatever implementing regulations are promulgated by the Secretary concerned. Thus most Army installation commanders must rely solely on the Army regulation just quoted. And since that regulation is notably different from the Department of Defense directive, Army members could be seriously deprived of their rights to assembly based on the mere whim of the commander, rather than on the constitutionally-based criteria established by the Department of Defense directive.

Finally, it should be noted that if permission to hold an assembly on a military installation is requested and denied, there are distinct problems in securing review of that

denial in the courts. If the individual concerned is a serviceman, the courts could require him to pursue an administrative remedy by submitting a complaint under Article 138 of the Uniform Code of Military Justice, as a prerequisite to hearing the case. Because of the close analogy of Article 138 to a petition for the redress of grievances, the mechanics of that article will be discussed in detail below; suffice it to say here that the article does provide machinery for subordinates in the military to secure the administrative redress of their grievances against their superiors' actions or decisions. The precedents established by the Court of Military Appeals which might be applied to the serviceman who requests permission to conduct an on-post assembly have arisen in the context of pre-trial confinement or confinement pending review of a sentence of court-martial. In both these cases, the Court of Military Appeals requires exhaustion of the Article 138 remedy. 679 Because an Article 138 complaint, which requires an investigation, may require some length of time, the date of the requested assembly might well come and go. Further, the civilian courts are not always too quick to react in these situations. Indeed, in The Committee to Free The Fort Dix 38 v. Collins, 680 the court

<sup>679</sup>Catlow v. Cooksey, 21 U.S.C.M.A. 196, 44 C.M.R. 160 (1971) (pre-trial confinement); Dale v. United States, 19 U.S.C.M.A. 254, 41 C.M.R. 254 (1970) (post-trial confinement awaiting appellate review).

<sup>680</sup> See supra, n. 651.

dismissed as moot a complaint of wrongful denial of permission to conduct an assembly on Fort Dix. The court made that determination because the date of the requested assembly had long passed, and the fact that Major General Collins, the post commander, had been transferred and was no longer in command of Fort Dix.

However complex these problems might be, they do not necessarily represent a situation where a serviceman has lesser rights than a civilian. The entire problem of securing judicial aid in these cases is discussed at length in Mr. Emerson's book under the heading of "Administration of Controls."681 He concludes "that the legal techniques for achieving the right of assembly and petition in practice have not developed very fast or very far. "682 Thus it is submitted that the difficulties here involved are no greater than those which civilians encounter in a purely civilian context. Indeed, if the Department of Defense directive were followed accurately and clearly concerning on-post assemblies, the military sphere might have more clear, definitive, and demonstrable guidelines upon which requests for permission to conduct assemblies could be granted or denied than most civilian permit systems. However, if the assembly's purpose were to

<sup>681</sup> Emerson at 364-386.

<sup>682</sup> Emerson at 386.

demonstrate against the military itself, or against a national policy like the Vietnam war which intimately and directly involves the military, it could be predicted that—with justification—the military would almost always apply the standards of the Department of Defense directive to result in denial of the request. Thus the standards may not give the results which the requesters would like in most cases; but that does not mean that the denial would be unconstitutional. It would, again, be only another example of the greater restrictions on a serviceman's rights which the military situation demands. And, again, if the requester were a civilian, it would be one of those circumstances where the military standard establishes a civilian's rights.

## 2. Petition

To the extent that the right to petition for the redress of grievances has been equated to the law concerning the right of assembly, all that has just been said is equally applicable. It also should be noted that the military frequently equates petitions to "literature" and so controls their circulation under those regulatory provisions discussed earlier concerning the distribution of literature on military installations, rather than treating the petition as an "assembly." For example, the Air Force regulations specifically include petitions within the purview of their controls over the distribu-

not mention petitions specifically but instead uses the word "publications" to cover all printed or written material sought to be distributed. However, to the extent that the Department of Defense directive imposes the <u>same standards</u> on both disseminations of "literature" and on-post assemblies—namely, that they must be permitted unless they present a clear danger to loyalty, discipline, or morale, or materially impair the orderly accomplishment of the military mission—the result would be the same. And, again, it must be stressed that the standards would apply to both servicemen and civilians who seek to circulate a petition on a military installation.

Callison v. United States 685 illustrates the point.

Callison received a draft induction notice, and he reported as ordered. While sitting at the induction station awaiting his turn to be processed, he solicited the signatures of others like him on an anti-Vietnam war petition which requested that the signers not be inducted because (it was asserted) the Vietnam war was "illegal." Although Callison had not yet been processed, much less inducted, he was informed by a military

<sup>683&</sup>lt;sub>AFR</sub> 30-1, 1 Aug. 1971, para. 9; AFR 35-15, 12 Jun. 1970, para. 3.

<sup>684</sup>AR 210-10, 30 Sep. 1968, para. 5-5, as changed by Change No. 3, 1 Dec. 1970.

<sup>685413</sup> F.2d 133 (9th Cir. 1969).

officer at the induction station that the circulation of the petition was not allowed without prior permission, and that since he had not secured the same he not only had to cease and desist but had to surrender the petition. Callison refused and was prosecuted under Federal statutes that require one reporting for induction to follow the orders of the induction station personnel. The court upheld the conviction on the "time, place, and manner" theory, and because the petition by its very contents tended to incite others to refuse induction, which was the very legal process which was then in progress. The facts of the case could easily be transposed to the circulation of a petition on a military installation as opposed to an induction station, and it would be assumed that the same results would occur and the same decision be reached if the case were brought into the courts.

It is interesting to note the possible interrelation—ships which could occur between the rights of petition and assembly if a petition were circulated on a military installation, the purpose of which was to petition the installation commander for permission to allow the signers to conduct an on-post assembly. This actually happened in <u>Dash v. Commanding General</u>, Fort Jackson, South Carolina; however, the court made no distinction and treated the entire problem as one of assembly.

<sup>686</sup> see supra, n. 614.

There are, however, some special considerations relating to the right of petition for the redress of grievances within the military.

Congressman concerning a grievance. For over a century this right was nonexistent in the military; now it is clearly authorized by 10 U.S.C. § 1034 (1970). It is interesting to note that even though a similar provision of law exists for civilian Government employees, <sup>687</sup> Mr. Emerson opines in his book The System of Freedom of Expression that there is "no authoritative ruling that the First Amendment right of petition applies to the individual grievances of workers in government agencies. But there is nothing in the background or purpose of the First Amendment" which would preclude such an application. <sup>688</sup> It is therefore most interesting to note that the Court of Military Appeals has made an authoritative ruling on this point relative to servicemen:

The record demonstrates beyond cavil a campaign of harassment and intimidation of a young soldier because he exercised his legal and unfettered right as a citizen and member of the armed forces to write a letter of complaint to his Senator. When that harassment and threatened misuse of the disciplinary processes of the Uniform Code of Military Justice led him to inform his commanding officer that he would bring such infamous treatment to the attention of the

<sup>687</sup>Lloyd-LaFollett Act of 1912, 5 U.S.C. 8 7102 (1970).

<sup>688</sup> Emerson at 571.

public, he was promptly charged with [and ultimately convicted of] extortion [in violation of Article 127 of the Uniform Code] and communication of a threat [in violation of Article 134 of the Uniform Code] . . .

Military discipline, harsh as it may often seem, is absolutely essential to the efficient functioning of our armed forces. But when it is perverted into an excuse for retaliating against a soldier for doing only that which Congress has expressly said it wishes him to be free to do, this Court would be remiss in its duty if it did not immediately condemn the effort to persecute him and stand as a shield between him and his superiors. No discipline can exist without fairness and justice, and this case bespeaks the lack of both.

. . . The right to petition Congress for a redress of grievances is too dear to permit its exercise to be limited by petty tyrannies. 689

While the above quotation states that the right to petition is a "legal unfettered right as a citizen and a member of the armed forces," it does not say that the right stems from the First Amendment. On the other hand, the language at the end of the quotation, that it is a petition "for the redress of grievances"—a direct quotation from the First Amendment, although not indicated as such—is indicative that the opinion is bottomed on the First Amendment and not merely on the statutory provision.

The second statute in question is Article 138 of the Uniform Code of Military Justice. It reads:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused

<sup>689</sup>United States v. Schmidt, 16 U.S.C.M.A. 57, 61; 36 C.M.R. 213, 217 (1966).

redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the secretary concerned a true statement of that complaint, with the proceedings had thereon.

Thus the serviceman gets, by statute, a clear right to complain about the actions and decisions of his superiors.

Implementation of this statute has been made by all the services. 690 The one factor contained in the implementing regulations which is not contained in the statute is a requirement that the "due application" for redress be in writing; and if a complaint is made, because that redress either is refused or is considered insufficient by the individual, the complaint also must be made in writing. Obviously this is to facilitate administration and would crystallize the issues in any given case; however, there is certainly no statutory requirement that either the request for redress or the complaint be in writing. It also appears that the courts find no such requirement. In Schatten v. United States, 691 a Marine Corps reservist was ordered to active duty for missing too many drill sessions. He sued to secure relief

 $<sup>^{690}</sup>$ AR 27-14, 15 Feb. 1972; AFR 110-10, 28 Oct. 1969; Navy Regs., Arts. 1242, 1243.

<sup>691419</sup> F.2d 187 (6th Cir. 1969).

from the order, alleging that the absences (which factually did occur) should have been excused. The court required the Marine Corps to allow Schatten to present his reasons why he thought his absences should be excused. Concerning Article 138, the court said

The record suggests that the Appellant attempted to exercise his right under Article 138 by asking his commanding officer for permission to speak to the commanding officer's superior. The Appellant's request was, apparently, turned down with no explanation given. The Appellant may well have taken this denial as an indication that there was nothing further he could do. 692

In addition to the requirement that these matters be in writing, the Army regulation sets a time limit on the right to complain:

A complaint pursuant to this regulation must be submitted to a superior commissioned officer within 90 days of the date of discovery of the alleged wrong, and the complainant must have requested in writing redress from his commander and have been refused. However, a commander exercising general court-martial jurisdiction may waive the 90-day time limit for good cause shown. 693

The imposition of requirements that the request for redress and the complaint be in writing, and that everything be accomplish within 90 days from the date of the alleged wrong, all lead to administrative convenience, present this issues clearly, and prevent "staleness." Yet they also may clearly prevent the processing of a valid complaint; the validity of the complaint would not necessarily constitute "good cause

<sup>692</sup> Id. at 190.

<sup>693</sup>AR 27-14, 15 Feb. 1972, para. 5<u>a</u>.

shown" for the <u>delay</u> in submission. Thus it appears that what could be a substantial right is subject to chilling by the implementing procedures administratively imposed by the services.

Finally, it should be noted that each of the services has an Inspector General system, which allows complaints to be made to the officer holding that position within the command and gives him power and authority both to investigate the complaint and to direct correction when due. In addition, military commands also recognize the right of anyone to complain to a commander simply by virtue of the fact that he is the commander—that is, to complain to the commander is a matter of military custom, outside the scope of either Article 138 of the Code or the Inspector General system. However, the disposition of such complaints lies solely within the discretion of the commander concerned. 694

What all these considerations show is the vagueness of the exact meaning of the constitutional privilege to petition for redress of grievances. The right obviously must include the right to circulate a petition to be signed—the right to create a written petition. Clearly the military authorizes this, although the petition itself is subject to review for content, and the circulation thereof is also subject to restriction, both on the standards imposed by the Department of Defense directive. In addition, however, the constitutional

<sup>694</sup> See, e.g., AR 600-20, 28 Apr. 1971, para. 5-37.

right must also relate to the use of the word "petition" as a verb; but even so, the right to petition for redress of grievances clearly does not connote a concurrent right to secure actual redress, and possibly imports no more than the right to fair consideration of the complaint. Thus all that really exists is a right to complain. On the other hand, Article 138's language is quite clear that redress is the real object of the game; the article specifically requires the superior commander exercising general court-martial jurisdiction to "examine into the complaint and take proper measures for redressing the wrong complained of." Thus even if there are some administrative restrictions on the Article 138 process which perhaps should not be there (the requirements concerning timing and that everything must be in writing), the fact that the article's ultimate aim is actual redress offsets to a great extent those unfortunate restrictions.

In sum, it would seem that a serviceman has perhaps more distinct routes to petition the Government, both in his capacity as an employee and in his capacity as a citizen, than civilian Government employees or other civilians have.

 Conclusion Concerning a Serviceman's Right to Assembly and Petition

Again the <u>leitmotiv</u> of discipline appears, accompanied by its sub-themes of loyalty and morale. It again is asserted as the reason why certain assemblies and petitions may be cut off, when sought to be conducted on military installations.

Given the need for military discipline, the result is in
evitable in certain cases. An example is most clearly stated
in <u>Dash v. Commanding General</u>, <u>Fort Jackson</u>, <u>South Carolina</u>: 695

It is the position of the [Government] that the very nature of the subject to be discussed at the meeting, taken in conjunction with the known views of the promoters of the meeting, warrants the conclusion that the meeting would have created unrest, provoked disorder and weakened discipline and morale among the military personnel at the base.

While the plaintiffs assert the purpose of the meeting was to discuss peaceably the justification of the Vietnam engagement and the right of the Post Commander to abridge such right of discussion, their own view of the issue to be discussed was plain: To them, the Vietnam war is an immoral war, engaged in wrongfully and carried on inhumanely. It must be assumed that a meeting, promoted by the plaintiffs, would seek to develop and expound that thesis. Can it be disputed that such a meeting, held on post and directed particularly at servicemen being trained to participate in the very war, would likely be calculated to breed discontent and weaken loyalty among such servicemen? Can training for participation in a war be carried on simultaneously with lectures on the immorality or injustice of such a war? In my opinion, the denial of the right for open, public meetings at advertised meetings on post for discussion of the propriety of the political decision to participate in the Vietnam war was justified "by reason of the peculiar circumstances of the military" and represented no infringement on the constitutional rights of the plaintiffs or others similarly situated. 696

Additionally, the thread of interference with the accomplishment of the military mission appears here; but in this context, as the above quotation shows, it will in many cases amount to

<sup>695&</sup>lt;sub>See supra</sub>, n. 614.

<sup>696307</sup> F. Supp. at 856.

the same thing as the disciplinary argument, and thus it will result in restricting the full exercise of one's right to assembly and petition.

Notwithstanding these justifiable limitations on a serviceman's rights, it does appear that servicemen are particularly well-equipped to complain to the Government and, especially through Article 138 of the Uniform Code of Military Justice, to submit petitions for redress. It particularly should be noted that Article 138 clearly requires that the petition be considered, and if it is considered justified, that the commander "take proper measures for redressing the wrong complained of," commensurate with its degree of justification. This is clearly a more extensive right than a civilian has to petition the Government for a redress of grievances.

Throughout this discussion, again as demonstrated in the quotation from the <u>Dash</u> opinion above, there is the intertwining of the freedoms of assembly and petition and the area of politics. As there are special problems involved in a serviceman's right to engage in political activities, the political aspects of these issues have been omitted from the preceding discussion. However, a separate discussion of those aspects of the problem is warranted, and it follows in the next section.

### C. Political Activities of Servicemen

Department of Defense Directive No. 1344.10, dated 23 September 1969, is entitled "Political Activities by Members of the Armed Forces." It attempts to set forth guidelines and practical examples to tell servicemen 697 exactly what their rights are in the political area. It begins by referring to five statutes which directly relate to servicemen and the political process.

The first statute, 50 U.S.C. § 1475 (1970), prohibits using one's military position to influence another member of the military to vote for a particular candidate, or to order a serviceman to vote at all. A final sentence in the statute states that "nothing in this chapter shall be deemed to prohibit free discussion regarding political issues of candidates for public office" within the Armed Forces. The second statute, 18 U.S.C. § 592 (1970), prohibits troops or armed men being directed to be at or near the polls on election days, unless "necessary to repel armed enemies of the United States." The third, 18 U.S.C. § 593 (1970), prohibits the military from interfering in various ways with voters, civilian or military—

<sup>697</sup>The directive is applicable only to active duty servicemen. DoD Dir. 1344.10, 23 Sep. 1969, para. I. It specifically excludes members of the reserves on active duty for training for not more than 30 days. DoD Dir. 1344.10, 23 Sep. 1969, Encl. 1, para. 6. Consequently, the directive can fairly be interpreted not to purport to affect retired regulars or reservists in their political activities.

such interference mainly being by use of proclamation, force, threat, or intimidation. The fourth statute, 10 U.S.C. § 973(b) (1970), is more directly related to the "man on a white horse" theory, in that it prevents any officer of the Regular Armed Forces (in contrast to the "reserve" forces) from holding both a military office and a civilian office at any level of government, Federal or State. It provides that if a Regular officer does hold a civilian office, he will lose his military office. This statute is commonly called the Dual Office Act. The final provision in this group, 18 U.S.C. § 596 (1970), prohibits anyone, civilian or military, from polling members of the Armed Forces "with reference to his choice or his vote for any candidate." Also, no one may publish or release the results of any such purported poll of servicemen. The statute defines a "poll" as "any request for information, verbal or written."

As Mr. Emerson points out in his discussion of the political rights of Federal Government civilian employees, 698 any restriction on the political activities of anyone--civilian, military, Government employee or not--which relates to coercion, intimidation, and other such actions which corrupt the political process, are clearly constitutional. Mr. Emerson applies his expression-action test to this conduct and finds it to be action, not expression. Thus the first three

<sup>698</sup> Emerson at 590.

of the statutes discussed above are clearly constitutional restrictions, in that they all relate to protecting the political process from corruption by the <u>action</u> of military personnel.

The Dual Office Act can be explained only by the desire to keep the military and civilian spheres of government separate, except as the Constitution establishes civilian supremacy over the military. Further, actually holding office is not "expression": it is without question action. Thus there would appear to be no First Amendment infirmity in the Dual Office Act.

Finally, there is the statute prohibiting polling servicemen to ascertain and publish or report their political views. This statute not only impinges on the right of a servicemen to say for whom he wishes to vote, but it also impinges on the right of both civilians and servicemen alike to conduct a poll in this context. Thus the statute clearly affects expression. However, before discussing its constitutionality, it will be helpful to point out the additional statutory and administrative controls which are imposed on the political activities of servicemen, and then to discuss the constitutional issue of all those provisions at one time.

In addition to the statutes listed above, the Department of Defense directive makes reference to various other statutes contained in Title 18 of the United States Code,

which statutes relate to the political activities of employees of the Federal Government in general.<sup>699</sup> It then goes on to give a detailed list of those activities which the Department of Defense interprets as either being permitted or prohibited, based on all the referenced statutes.

To give a clear understanding of just what the scope of these limitations is, the language of the directive itself, although lengthy, best conveys the scope of the problem. Thus direct quotation is in order. However, the directive uses two terms in a special way, which must be understood before the quotation will be meaningful. The terms are "partisan" and "non-partisan" political activity. The first, "partisan" political activity, is defined as

activity in support of or related to candidates representing, or issues specifically identified with, National or State political parties and associated or ancillary organizations. 700

"Non-partisan" political activity is defined as

activity in support of or related to candidates not representing, or issues not specifically identified with, National or State political parties and associated or ancillary organizations. (Issues relating to Constitutional amendments, referen-

<sup>69918</sup> U.S.C. § 594 (1970) (intimidation of voters);
18 U.S.C. § 602 (1970) (solicitation of political contributions); 18 U.S.C. § 603 (1970) (place of solicitating political contributions); 18 U.S.C. § 606 (1970) (intimidation to secure political contributions); 18 U.S.C. § 607 (1970) (making political contributions); 18 U.S.C. § 608 (1970) (limitations on political contributions and purchases for political purposes).

<sup>700&</sup>lt;sub>DoD</sub> Dir. 1344.10, 23 Sep. 1969, para. III.A.

dums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with National or State political parties.) 701

The directive then says that a member of the Armed Forces on active duty may:

- a. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces.
- b. Promote and encourage other military personnel to exercise their franchise, provided such promotion does not constitute an attempt to influence or interfere with the outcome of an election.
- c. Join a political club and attend its meetings when not in uniform.
- d. Serve in a local part-time non-partisan civil office, appointive or elective, e.g., chairman P.T.A., provided the requirements of the office do not interfere with military duties and the member receives the prior approval of the Secretary concerned or his designee.
- e. Serve as an election official, provided such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the prior approval of the Secretary concerned, or his designee.
- f. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces.
- g. Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, provided those views do not attempt to promote a partisan political cause.
- h. Write a personal letter, not for publication, expressing preference for a specific political candidate or cause, provided the action is not part of an organized letter-writing campaign in behalf of a partisan political cause or candidate.

<sup>701</sup> Id., para. III.B.

- Make monetary contributions to a political party or political committee favoring a particular candidate or slate of candidates, subject to the limitations of sections 607 and 608, title 18, United States Code.
- j. Display a political sticker on his or her private automobile. 702

The directive says that a member of the Armed Forces on active duty may not:

- a. Use official authority or influence for the purpose of interfering with an election, affecting the course or outcome thereof, soliciting votes for a particular candidate or issue or requiring or soliciting political contributions from others.
- b. Be a partisan candidate for civil office, Federal, State, or local except under conditions set forth in Section IV of this Directive [to be quoted later], or engage in public or organized solicitation of others to become partisan candidates for nomination or election to civil offices.
- c. Participate in partisan political management or campaigns, or make public speeches in the course thereof.
- d. Make a campaign contribution to another member of the Armed Forces or to a civilian officer or employee of the United States for the purpose of promoting a political objective or cause.
- e. Solicit or receive a campaign contribution from another member of the Armed Forces or from a civilian officer or employee of the United States for the purpose of promoting any political objective or cause.
- f. Allow or cause to be published partisan political articles signed or authored by the member for the purpose of soliciting votes for or against a partisan political party or candidate.
- g. Serve in any official capacity or be listed as a sponsor of a partisan political club.
- h. Speak before a partisan political gathering of any kind to promote a partisan political party or candidate.
- Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate.

<sup>702</sup> Id., Encl. 1, para. 2.

j. Conduct a political opinion survey under the auspices of a partisan political group, or distribute partisan political literature.

k. Use contemptuous words against the office holders described in [Article 88 of the Uniform Code of Military Justice], or participate in [activities which violate security].

Perform clerical or other duties for a partisan political committee during a campaign or on elec-

tion day.

m. Solicit or otherwise engage in fund raising activities in Federal offices or facilities, including military reservations, for a partisan political cause or candidate.

n. March or ride in a partisan political parade.

o. Display a large political sign, banner, or poster on the top or side of his or her private automobile (as distinguished from a political sticker).

p. Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by or associated with a partisan political party or candidate.

Sell tickets for or otherwise actively promote political dinners and other such fund-raising

events.

r. Attend, as official representatives of the Armed Forces, partisan political events even though they do not actively participate. 703

Finally, for acts not specifically listed, the direc-

## tive says:

Some activities not expressly prohibited would be contrary to the spirit and the intent of the Directive. In determining whether or not an activity violates the traditional concept that military personnel must not engage in partisan political activity, rules of reason and common sense will apply. Any activity that could be interpreted as associating the Departments of Defense or Transportation, in the case of the Coast Guard, or any element thereof directly or indirectly with a partisan political cause or candidate must be avoided. 704

<sup>703</sup> Id., Encl. 1, para. 3.

<sup>704</sup> Id., Encl. 1, para. 4.

Act. 705 That act purportedly establishes the guidelines for prohibited and permitted political activities of Federal Government employees. It is, interestingly enough, notably absent from the list of statutory provisions referred to in Department of Defense Directive No. 1344.10. The tacit assumption must be that the Department does not consider the Hatch Act applicable to the military; indeed, that proposition was stated orally to the author in a casual conversation with the Deputy Chief, Military Affairs Division, Office of The Judge Advocate General of the Army. 706

Act read that "It shall be unlawful for any person employed in the executive branch of the Federal Government or any agency or department thereof, to . . . "707 Clearly servicemen are persons employed in a department which is part of the executive branch of the Government. Thus there would seem to be no reason why the Hatch Act would not apply, apart from the fact that the Act is interpreted and applied to civilian employees by the Civil Service Commission, which obviously

<sup>7055</sup> U.S.C. §§ 7324-7327 (1970) (principal sections).

<sup>706</sup> Interview with Lieutenant Colonel David L. Minton, Deputy Chief, Military Affairs Division, Office of the Judge Advocate General of the Army, at the Pentagon, Washington, D.C., 30 Mar. 1972.

<sup>707&</sup>lt;sub>5</sub> U.S.C. § 7324 (1970).

has no authority over military personnel. But that fact would not prevent the Department of Defense from applying the act to military personnel. Additionally, it is interesting to note that there is some indication in other contexts that the Hatch Act does indeed apply to servicemen. For instance, Army Regulation 360-5, which requires the submission of all writings and speeches for review prior to their publication or the giving of the speech itself, as the case may be, states that no writing or speech by an Army member should be "contrary to law, e.g., if applicable, . . . the Hatch Act . . . "708

However, perhaps this omission is more academic than real, since the restrictions quoted above imposed on military personnel are virtually the same as those imposed under the Hatch Act, in addition to insuring compliance with those provisions of law discussed above which specifically and directly apply to the political activities of servicemen as such. Thus whatever comments could be made about the constitutionality of the Hatch Act apply with equal force to Department of Defense Directive No. 1344.10.

The Supreme Court specifically considered the constitutionality of the Hatch Act in 1947 in <u>United Public Workers</u>

v. <u>Mitchell</u>, 709 and held the act constitutional. Thus it

<sup>708</sup> AR 360-5, 27 Sep. 1967, para. 9b(1)(b).

<sup>709330</sup> U.S. 75 (1947).

would seem that the same restrictions imposed on a serviceman, plus those imposed specifically on him by virtue of his military status, would likewise be constitutional.

However, Mr. Emerson opines in his book The System of Freedom of Expression that if the constitutionality of the Hatch Act were again to be considered by the Supreme Court today, the Court would hold it unconstitutional. Mr. Emerson analyzes the area of political activity by Government employees, using his expression-action test, and delineates in detail those restrictions which he believes to be proper (because they represent a valid management control of the government as an employer, or because they constitute "action" rather than expression), and those restrictions which he believes should be lifted (because they are only "expression"). To repeat that excellent analysis in this paper would only be a direct plagiarism of pages 590-591 of Mr. Emerson's work and is not necessary to the exposition of the issues in the military context.

However, as has been noted many times previously, Mr. Emerson specifically excludes the military from his considerations. Thus it cannot be said that just because the Hatch Act ought to be declared unconstitutional vis-a-vis civilian Government employees, the restrictions on servicemen are also unconstitutional. It has already been said that several of the statutes which apply directly to the possibility of mili-

tary intimidation, coercion, and force in the political process are valid in the interests of the "security" of that process. The Dual Office Act prohibits servicemen from holding both a military and a civilian office. What is the purpose of the other restrictions so lengthily listed above?

First, the "man on a white horse" theory is clearly involved. Although there are provisions 710 permitting running for political office while a member of the military under certain circumstances, the general theory is that if a military man wants to run for political office, he ought to do so from outside active military service. This would allow a retired officer to run for office, which was Eisenhower's status when he ran for President. As the Department of Defense directive states it, the "traditional concept [is]

<sup>710</sup> However, DoD Dir. 1344.10, 23 Sep. 1969, does provide for some sort of limited activity in this context while on active duty. Para. IV.B. of the cited directive reads:
B. Candidacy for Elective Office.

<sup>1.</sup> A member subject to this Directive may not campaign as a partisan candidate for nomination or as a partisan nominee for civil office. However, where the circumstances justify, the Secretary concerned or his designee may permit the member to file such evidence of his nomination or candidacy for nomination as may be required by law. Such permission shall not authorize activity while on active duty that is otherwise prohibited by this Directive.

<sup>2.</sup> A member may not become a non-partisan candidate for any civil office requiring full-time service while serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receive schooling, or other training wholly or partly at the expense of the United States.

that military personnel must not engage in partisan political activity." 711 It is interesting to note in this connection, however, that the "tradition" may not be a very old one:

There is no doubt that Generals Scott, Grant, and McClellan all ran for President without either retiring or resigning their commissions. Thus the actual validity of this argument is somewhat doubtful.

Second, the military is often the instrument of political policy, particularly international policy involving hostilities. The war in Vietnam is virtually a classic example to indicate the degree to which foreign hostilities can become a prime political issue. It is logically inconsistent for a serviceman, the instrument of that foreign policy, to be actively engaged in the political arena where the policy is being questioned, particularly when the position of the serviceman might quite likely be against current policy. For superiors to campaign actively against a Government policy could seriously undermine discipline and esprit de corps within the military; servicemen under their command would say, "Why should I go fight, or even remain in the military, when my commander is 'against' it, too?" Thus it is better for the commander to be officially silent.

In essence, then, the military "tradition" of noninvolvement with politics is in itself a kind of management

<sup>711</sup> DOD Dir. 1344.10, 23 Sep. 1969, Encl. 1, para. 4.

tool: Active participation in partisan politics could so seriously undermine effective internal management of the military that such active participation is prohibited. Even Mr. Emerson concedes that restrictions mandatory for internal harmony and for the effectuation of good management controls are constitutional. 712 In one place, he points out that it is a proper basis for imposing restrictions on civilian Government employees' political activities that "employees who are active in partisan political affairs may not respond loyally to the demands of their employment, may perform their duties with partisan bias, or may give the appearance of doing so." 713 While Mr. Emerson rejects this argument as a basis for general restrictions on the political activities of civilian Government employees, the military cannot afford these results, given its autocratic system, its need for discipline, and the fact that it must be and is in fact an instrument of national policy, regardless of the opinion of the individual serviceman.

It also should be noted that the Department of Defense list of prohibited and permitted activities seeks to give the serviceman the widest <u>personal</u> latitude in his participation in the political process, short of that participation in-

<sup>712</sup> Emerson at 570.

<sup>713</sup> Emerson at 591.

volving the military or using the individual's military status to some political advantage. What is prohibited is his expression of his political views so that it appears that it is the attitude of the military establishment itself, or so that is possibly causes disruption and disharmony within the military establishment. However, the issues of what is "personal" and what affects "management" of the military are not always easily resolved, nor are the guides listed in the Department of Defense directive always easily applied in fact.

For example, one of the arguments advanced by Lieutenant Howe against his conviction for violating Article 88 of the Uniform Code of Military Justice was that his conduct really amounted to participation in a political "discussion." 714

In support of his contention, he did not cite any provision of Department of Defense Directive No. 1344.10, nor did he cite the final sentence of 50 U.S.C. § 1475: "... but nothing in this chapter shall be deemed to prohibit free discussion regarding political issues or candidates for public office." Instead, Lieutenant Howe cited the discussion of Article 88 in the Manual for Courts-Martial:

. . . Adverse criticism of one of the officials or groups named in the article, in the course of a political discussion, even though emphatically expressed, if not personally contemptuous, may not be charged as a violation of the article. 715

<sup>714</sup> United States v. Howe, 17 U.S.C.M.A. 165, 179-180; 37 C.M.R. 429, 443-444 (1967).

<sup>715&</sup>lt;sub>M.C.M., para. 167.</sub>

Unfortunately, the Court of Military Appeals did not discuss the extent to which one may have "private" political discussions and not run afoul of the prohibitions of the Department of Defense directive or the law. Instead, the court replied to the Lieutenant's argument by simply quoting the sentence in the Manual which immediately follows that offered by Lieutenant Howe:

However, giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article or the utterance of such contemptuous words in the presence of military inferiors, would constitute aggravation of the offense.716

Because Lieutenant Howe carried his placard in a public park in El Paso, Texas, and because there was evidence in the record that there were military policemen present (who were enlisted personnel, and thus Lieutenant Howe's military inferiors), as well as other enlisted personnel present in civilian clothing, the court made no further discussion of the private political discussion argument, other than quoting the Manual as above. Thus so long as the Court of Military Appeals and other courts uphold the constitutionality of Article 88, officers in the military are quite restricted in what they may do, even privately, in the political arena.

Concerning enlisted personnel, the problem is much easier, since Article 88 does not apply to them. However,

<sup>716</sup> Id.

the cases of <u>United States v. Daniels</u>, 717 Harvey, 718 and <u>Gray</u> 719 have been discussed above; all of these cases involved protest against the Vietnam war and to that extent could certainly be considered "political." Yet in each the manner in which the protest was stated amounted to a call to the hearers to refuse their military obligations. Thus all three were convicted of creating disloyalty and disaffection among the troops, thus undermining military discipline and <u>esprit de corps</u>.

What all these examples show is that political activities will not be justified if they violate specific provisions of law, particularly those affecting good order and military discipline discussed in this paper. Thus the serviceman is doubly restricted: He must not only comply with the Department of Defense list of restrictions on political expression per se, but he must also comply with those general restrictions on his rights of expression which might be violated as part of his otherwise permissible political expression.

In contrast, the Supreme Court has said that strong criticism of public officials or policy, in the political or any other arena, is protected speech, absent a deliberate or

<sup>717</sup> See supra, n. 584.

<sup>718</sup> See supra, n. 595.

<sup>719</sup> See supra, n. 597.

reckless falsehood. 720 Particularly in point here is Bond v. Floyd. 721 Julian Bond was elected to the Georgia legislature. He had made a number of public statements against the war in Vietnam, and they were pretty strong statements, to be sure. Purportedly only because of the statements (Bond was also Black), the Georgia legislature refused to seat him. Bond sued to be seated, and the case ultimately reached the Supreme Court. The Court unanimously held that the refusal to seat Bond violated the First Amendment, saying that Bond had a right to make statements in opposition to national policy concerning Vietnam. Implicit in this holding is the principle that there is no constitutional inconsistency in being a public official and making public statements in opposition to national policy. Do these considerations mean that all that has been said above is constitutionally unsound? Do servicemen--who are clearly public employees as much as Julian Bond was--have the right to make even public political statements? The foregoing discussion would indicate that even private political statements can sometimes be prohibited, or at least seriously curtailed in the military. Can these be reconciled?

The solution to this seeming dilemma is that the con-

<sup>720</sup> Garrison v. Louisiana, <u>supra</u>, n. 570; New York Times v. Sullivan, <u>supra</u>, n. 572.

<sup>721&</sup>lt;sub>385</sub> U.S. 116 (1966).

siderations as applied to the military, while perhaps the same considerations as those applied in the Bond case, simply "come out" different. A civilian political figure like Julian Bond is the very essence of the political process. He is indeed a political figure. The political process would be meaningless if the very participants in it did not have the freedom to speak out on national policy; indeed, they are the ones who create that policy, or amend it, or abolish it. Thus the considerations as to them are completely different from those applicable to the military. The military does not -- and should not--create national policy. Likewise, it should neither control or change such policy after it already exists. Particularly when the policy in question relates directly to the military--such as the conduct of a war--it is even more necessary that the military "stay out of it." These were the views expressed in Dash v. Commanding General, Fort Jackson, South Carolina, quoted at the end of the preceding section. 722

However, what about political issues which do not clearly affect the military? Should the restrictions imposed relate to the problem, or is it valid that the restrictions be
"blanket" restrictions, as indeed they are? This is a difficult question. On the one hand, the argument could be made
that there are few political issues which do not affect the

<sup>722</sup> See supra, n. 696.

military in some way. If the issue is the allocation of Federal funds for non-military purposes, that allocation must almost always be considered in relation to how much of the budget will go to the military. Foreign policy almost invariably involves some military considerations. And since the President is the Commander-in-Chief, for a serwiceman to speak out in the political arena of Presidential elections is at best a "close" situation; if the content were "against" re-election of the incumbent and urged his replacement, the problem is more acute, especially so long as Article 88 of the Uniform Code is upheld by the courts. In essence, this argument amounts to saying that the role of the military in modern times is so all-pervasive that it is fairly difficult to find some political issue, especially on the national level, and especially any issue of any significance, which does not involve military considerations. Thus servicemen should "stay out."

on the other hand, the "all-pervasive" argument obviously goes too far. Clearly there are important political issues which do not affect the military as such. Why should not a serviceman speak his mind either for or against abortion, or the income tax, no-fault insurance, busing, devaluation of the dollar, and so on? These do not involve military considerations—or, if they do, they are so remotely connected with the military that they should not be denied

the serviceman.

But--as usual, it seems--the issue would be where to draw the line. Who is to determine whether a particular political issue is either "too connected" with the military or not, so that political discussion either may or may not be had on that subject? Further, it is easy to miss the <u>real</u> issue:

Servicemen are not cut off from <u>all</u> political discussion; what is prohibited is their political activity of a non-private nature--in other words, political activity with publicity attached.

As has been noted before, the military rule against non-public participation in politics amounts to a management tool. Internal harmony, military loyalty, discipline, and morale must be maintained. Nothing could be so potentially divisive as differing, strongly-held political views, especially by the top military echelons. Factionalism could easily result from complete publicity, and rifts too wide to be consistent with effective military operations could ensue. While political discussions on a person-to-person basis must be--and, indeed, are--permitted, political activities which go beyond that level go too far, given the special context of the military.

Also there is some merit in the notion that the military should not be considered by the civilian community as having a political stand. The appearance of the military

actively and publicly espousing a particular political view, party, or candidate, comes too close to the "man on a white horse" problem. Civilians could (wrongfully, to be sure, but in fact) interpret the existence of a strong, military-backed political position as military intimidation. The goal of United States political theory has always been to keep the military subordinate to and controlled by the civilian community—not the reverse.

Thus if the individual serviceman must suffer some restrictions in the political area, they are restrictions imposed for the greater good--first, for the maintenance of internal harmony, discipline, and order within the military itself; and second for the maintenance of the very democratic system of government which the United States enjoys. Viewed in this light, the restrictions imposed are not unconstitutional "abridgements" of a serviceman's political rights.

These are amorphous concepts; they do not lend themselves to precise analysis. Yet their aggregate shows a
valid social reason why servicemen should be restricted in
espousing too publicly their political views. It is only
another example of the fact that, while the First Amendment
does apply to servicemen, it applies "differently."

D. Summary and Conclusions Concerning a Serviceman's Freedom of Expression

The restrictions and consequent limitations on a serviceman's freedom of expression are many. The reasons why
those limitations are imposed are also many--national security
from both external and internal attack, civilian control of
the military, the efficient operation of the military, the
needs of good order, and the maintenance of loyalty, discipline, and morale.

This means that a serviceman's freedom of expression is without question less than a civilian's. But that does not mean that the restrictions are unconstitutional. It must be remembered that in only a very few instances in the preceding discussion has it been said that a particular restriction was an unconstitutional "abridgement"—the notable examples being Article 88 of the Uniform Code of Military Justice and the "policies and programs" criterion for the review of "key" officials' speeches and writings under Department of Defense Directive No. 5230.9. Further, there were only two other situations considered where it was concluded that the military proscriptions on speech were "doubtful"—communication of a threat to a third party rather than directly to the threatened individual, and the offense of criminal libel.

In contrast, analysis of the vast majority of the instances considered resulted in a determination that there was no First Amendment infirmity in the restriction in question. In a goodly number of cases—such as treason, mutiny, inciting riot, and military sedition—this was because analysis indicated that the conduct concerned was more properly categorized as "action" rather than "expression" and hence not entitled to First Amendment protection. The security system involving classified defense information was found to be constitutional because of its inherent connection with the business of the military; this was partly true of the political activities problem as well. However, the major reason why many of these restrictions are valid was the ends of good order and discipline in the military. Thus it might be well to repeat the Army's definition of discipline:

a. Military discipline is a state of individual and group training that creates a mental attitude resulting in correct conduct and automatic obedience to military law under all conditions. It is founded upon respect for and loyalty to properly constituted authority.

b. While military discipline is enhanced by military training, every feature of military life has its effect on military discipline. It generally is indicated in an individual or unit by smartness of appearance and action; by cleanliness and neatness of dress, equipment, and quarters; by respect for seniors; and by the prompt and cheerful execution by subordinates of both the letter and the spirit of the legal orders of their lawful superiors. 723

The most telling phrase in the quoted definition is the statement that "every feature of military life has its effect on military discipline." This being the case, is it any wonder

<sup>723</sup>AR 600-20, 28 Apr. 1971, para. 5-1.

that military discipline would loom so large as a reason to restrict a serviceman's complete freedom of expression?

Hardly; on the contrary, the pervasiveness of the need for military discipline is merely reflected by the frequency of its citation as the reason for a particular restriction.

Thus the First Amendment applies, but "differently."

#### PART V

### ADMINISTRATIVE CONTROLS

Throughout the entire discussion of both a serviceman's freedom of religion and his freedom of speech, the major operative controls actually restricting those freedoms have fallen into a very few clearly-discernible categories. First, there have been statutes, such as the Smith Act and the Hatch Act, and notably certain provisions of the Uniform Code of Military Justice, such as Article 88's prohibitions of contemptuous language by officers towards certain civilian officials and bodies. Second, there have been regulations, both at the Department of Defense level and at Secretarial level. These regulations have governed, among other things, the military chaplaincy program, dress and appearance, the rights of assembly and petition, and a serviceman's political activities. These become "controls" because violations of the statutes in question are punishable, sometimes through both the civilian courts and the court-martial system, and in other cases only the court-martial system. Further, violations of the regulations in question may also be punished under the Uniform Code of Military Justice, and therefore criminal sanctions must again be imposed through court-martial. Finally, some of these regulations may even be imposed on civilians, through the operation of 18 U.S.C.

§ 1382 (1970). It was also noted that in some cases, specific orders restricting free speech were involved, the orders not being based on either statute or regulation. Of course if the order-giver is a superior military officer, the violation of the order becomes an offense triable by court-martial.

But there are other administrative controls which can affect a serviceman's and sometimes a civilian's First Amendment rights, some of which have been touched on briefly before, but all of which deserve more detailed comment.

# A. Controls over Military Personnel

Among the administrative controls over military personnel are bad efficiency ratings, discharge, transfers to a less desirable job or the refusal to assign the individual to a more desirable job, and the simple physical transfer of the individual from one geographical place to another. 724

If any of these actions is taken as the result of the exercise of a serviceman's First Amendment rights, it is clear that the action can have tremendous impact—at least as significant as, and in some cases greater than, a criminal prosecution. Particularly is this critical when the act by the serviceman is First Amendment—protected. If he were prosecuted, he could always raise the defense that his conduct was

<sup>724</sup> vaghts, Free Speech in the Armed Forces, 57 Col. L. Rev. 187 (1957).

constitutionally protected; but does he have a similar defense to the administrative actions which could be taken against him? And if so, how would he raise it?

The basic case on which every subsequent decision appears to turn is Orloff v. Willoughby, 725 decided by the Supreme Court in 1953. Dr. Orloff had been drafted under the so-called "doctor's draft," which he alleged carried with it a requirement that he be commissioned as an officer. The doctor was not commissioned, and he sued either for release from the Army or for a commission. A majority of the Supreme Court refused to interfere with the Army's administrative handling of the Orloff situation, calling the issuance or non-issuance of a commission a "legitimate Army matter" with which it would not interfere. Earlier, the long line of cases subsequent to Orloff espousing this "hands-off" attitude towards the internal administration of the military was discussed; the cases there listed show that the theory is by no means dead.

Two cases will illustrate the problem.

Arnheiter v. Ignatius 728 was a suit by a Navy Lieutenant Commander to seek to reverse an administrative de-

<sup>725345</sup> U.S. 83 (1953).

<sup>726</sup> Id. at 94.

<sup>727</sup> See supra, n. 160.

<sup>728&</sup>lt;sub>292</sub> F. Supp. 911 (N.D. Cal. 1968).

cision that he should permanently be relieved from command of a ship and given only port and shore duties. While this may not seem necessarily drastic, it must be understood that in the Navy the ultimate duty assignment is the command of a ship; if that duty is performed satisfactorily or excellently, the officer's future career picture is rosy; but if it is performed unsatisfactorily, and particularly if one is relieved of the command of a ship prior to the normal date on which the command would terminate—as was Lieutenant Commander Arnheiter—the death knell to one's further advancement in the Navy has tolled. The court, citing Orloff, refused to intervene.

It can easily be seen that had Lieutenant Commander Arnheiter been relieved of his command because he said something, not punishable by law, and not so job-connected that he would be deprived of First Amendment protection, his right to speak would be greatly lessened. As a matter of fact, the opinion of the court does not anywhere lay out the reasons why the Navy relieved Arnheiter; however, unofficial sources indicate that he was indeed a poor commander and that his relief was perhaps proper; it is even implied that one of the major reasons for his relief was a Chaplain's report that Arnheiter had issued an order making the attendance at religious services on Sunday mandatory for all personnel on board the ship. The facts of the Arnheiter affair are

<sup>729</sup> See Sheehan, The Arnheiter Affair (1972).

not the issue, however; the issue is the power of the military to take action such as that in the Arnheiter situation and the fact that the courts will virtually refuse to review the propriety or impropriety of it.

The second case, <u>Cortright v. Resor</u>, 730 clearly raises First Amendment problems.

Cortright was a member of the Army Band stationed at Fort Wadsworth, New York. He was against the war in Vietnam. He had circulated two anti-war protest petitions, without permission. It was alleged by the Government—and not seriously controverted—that Cortright's activities had created a schism between one faction in the Band which sided with his anti-war views, and another faction which opposed them. Finally, during a parade in Brooklyn, four wives of various Band members and Cortright's fiancee came out onto the street and marched along with the Band, carrying anti-war protest placards. It was alleged by the Government—and again not seriously controverted—that this incident was planned by Cortright.

The Army reacted to Cortright's activities first by seeking to cure the problem by command "talks," given by the Band commander (an officer). When those apparently accomplished nothing, there were various changes in the duty requirements and privileges of the Band members. Where previous-

<sup>730447</sup> F.2d 245 (2d Cir.), reversing 325 F. Supp. 797 (E.D.N.Y. 1971).

ly they were not required to be present for duty on a full eight-hour basis, they were so required to be present; where they did not have to stand the traditional six-in-the-morning reveille formation, they were required to do so; where they were exempt from the performance of "full" police (clean-up) details, the exemption was withdrawn; and where they had been allowed to give private music lessons during duty hours, that privilege was terminated. Finally, when none of these achieved what the Army considered satisfactory results, but instead had reduced Band morale to a real low point, Cortright and others of the anti-war protester faction were transferred out of the Band, Cortright himself being sent to Fort Bliss, Texas. There is also an intimation in the opinions that Cortright received an inferior-level court-martial for some of his activities.

Cortright sued to secure revocation of the orders transferring him to Fort Bliss. The district court found that his transfer had been ordered specifically for the

purpose of halting the public expressions of disagreement with the Vietnam War by Band members. . . The Army does not deny that Cortright's transfer was effected in order to halt his leadership of the anti-war activities of the Band. 731

Further, the court held that under these circumstances the transfer was an unconstitutional "punishment" of Cortright's constitutionally-protected right of free speech.

<sup>731325</sup> F. Supp. at 824.

The Army never denied that Cortright's transfer was indeed to "halt his leadership of the anti-war activities of the Band." Indeed, the court of appeals also found that the administrative changes which the Army had effected were all geared to that end. However, the military reasons for the action were that the other administrative sanctions imposed had failed to effect any change and instead had caused such a drop in the morale of the Band as a whole that the only final solution was to "break up" the existing composition of the Band and direct Cortright's and others' transfers in order to promote military efficiency within the Band. The court of appeals found no punishment in this military action, however. It held

We do not say that a case could never arise where a transfer order could be invalidated by a civilian court on [a constitutional] basis. But any such judicial intrusion into the area broadly defined by the Constitution to the President as commander-in-chief and his authorized subordinates must await a stronger case than this one. 732

The court of appeals cited <u>Orloff</u>, and noted that the decision in the district court was <u>the only case</u> after <u>Orloff</u> which had ever purported to direct a change in military duty orders.

Given this posture of the law, one can agree with the court of appeals in <u>Cortright</u> that it is <u>possible</u> that a case could arise where orders, decisions, and directives affecting

<sup>732447</sup> F.2d at 246.

the internal administration and operation of the military could be invalidated by a civilian court on a constitutional basis. Based on the analysis previously made in this discussion concerning the constitutionality of the military's restrictions on circulating petitions and participating in demonstrations, it is not at all clear that Cortright's activities were constitutionally protected, as the district court found that they were. Unfortunately, the court of appeals did not base its decision on an analysis of whether Cortright's actions were or were not constitutionally protected; rather, it went on the "hands-off" theory of Orloff and thereby never reached the constitutional issues. Thus the Cortright decision is not necessarily wrong; it simply would have been a much more satisfying decision had it analyzed the constitutional aspects.

Hence the critical issue is whether, in a case where there is no doubt that the actions of a serviceman are constitutionally protected, would the courts again simply cite Orloff and so never reach the constitutional issue? The point is that decisions based solely on Orloff create the very real possibility and indeed the danger of judicial approval of military administrative actions in a case where a constitutional right has been violated. Hopefully the Cortright decision was written as it was simply because the court of appeals did indeed find that Cortright's constitutional

tional rights had not been violated—and thus the citation to Orloff was sufficient in its view. At least the opinion indicates, in the portion quoted above, that the court recognized that there was a constitutional issue involved, and that in an appropriate case that issue might be the basis for decision. Hopefully, other courts will also recognize the constitutional claim in appropriate cases—and adjudicate it, as well.

## B. Controls over Civilians

Servicemen are not the only ones who fall under the scope of the military's administrative powers in relation to the exercise of First Amendment rights; civilians do as well, as the previous discussion has indicated. But to put the problem in sharper focus, a few cases should be mentioned. It should be stressed that they are not necessarily instances where a constitutional right was wrongly "punished" by the military; rather, the cases will show that the military's administrative powers could, in a given context, be used to "punish" or at least prohibit the exercise of First Amendment rights by civilians.

The first is a case previously discussed, <u>Goldwasser v.</u>

<u>Brown</u>. 733 There, it will be remembered, Goldwasser was dismissed from a teaching position with the United States Air

<sup>733</sup> See supra, n. 605.

Force because he made derogatory remarks in class concerning United States policy in Vietnam and concerning Jews, to a group of foreign students to whom he was to teach English. After being directed to desist and not doing so, he was dismissed "for cause." While the court in Goldwasser found no constitutional "abridgement" and upheld his dismissal, the case does show that even civilians can be dismissed from Government employment with the military for matters involving the First Amendment.

The second broad area of cases is that involving the exclusion of civilians from designated military reservations. There are a number of cases in this area, the leading one being Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy. 734 In that case a security clearance was taken away from a civilian employee of a restaurant concession located within the confines of the Naval Gun Factory in Washington, D.C. Without the security clearance, the employee was automatically barred from entering the installation, and she therefore automatically lost her job. The Union sued on her behalf, even though there was a clause in the contract between the Union and the Government that if the security clearance of a Union member were withdrawn, the employee would be barred from entry onto the installation. The Union's

<sup>734367</sup> U.S. 886 (1961).

theory was that the procedure whereby the security clearance had been withdrawn was invalid, since no hearing had been held. The Court found that the Government had followed its stated procedures, and the mere fact that those procedures did not give the worker a hearing was irrelevant:

It cannot be doubted that both the legislative and executive branches are wholly legitimate potential sources of . . . explicit authority [to revoke a security clearance]. The control of access to a military base is clearly within the constitutional powers granted to both Congress and the President. 735

For this last proposition, the Court cited Article I, § 8 and Article II, § 2 of the Constitution. The <u>Cafeteria & Restaurant Workers Union</u> case has come to stand for the proposition that military installation commanders have very wide discretion in determining who they will allow on their installations and that, in the absence of an abuse of that discretion, the courts will not interfere.

For example there is <u>Weissman v. United States</u>. 736
Weissman participated in a demonstration during the proceedings of a court-martial at Fort Sill, Oklahoma, which demonstration was so noisy that it disrupted the trial and caused it to be delayed. Because of his participation, he was barred from future entry onto the reservation. Later, he was appre-

<sup>735</sup> Id. at 890.

<sup>736387</sup> F.2d 270 (10th cir. 1967).

hended riding in a car on the reservation and prosecuted under 18 U.S.C. § 1382 for violating the exclusion order. Here the court of appeals refused even to review the basis for the issuance of the bar, holding that it was solely within the commander's discretion—although the court did note that it had sufficient facts before it to find the exclusion reasonable on the basis of maintenance of good order and discipline on the installation. Similar—and even more summary decisions—were rendered in two cases where juveniles were excluded from the post under 18 U.S.C. § 1382. 737 In another case where the individual had made a distribution of literature on the installation without securing prior permission, his exclusion as a result thereof was upheld. 738 These last three cases, all decided by the Fifth Circuit, cite the Cafeteria & Restaurant Workers Union case.

Bridges v. Davis 739 was a similar case, but the court did go somewhat further than merely to cite <u>Cafeteria & Restaurant Workers Union</u>. In <u>Bridges</u> the plaintiffs were several clergymen who apparently headed an anti-war protest movement on Hawaii. They had made their churches available as "sanc-

<sup>737</sup>Government of the Canal Zone v. Brooks, 427 F.2d 346 (5th Cir. 1970); United States v. Jelinski, 411 F.2d 476 (5th Cir. 1969).

<sup>738</sup> United States v. Flower, 452 F.2d 80 (5th Cir. 1970).

<sup>739443</sup> F.2d 970 (9th Cir. 1971) (per curiam), <u>affirming</u> 311 F. Supp. 935 (D. Haw. 1969).

tuary" for various servicemen who were protesting the Vietnam war. The servicemen had been returned to military control and were incarcerated at various military posts on Hawaii. The ministers sought access to the installations to "counsel" the prisoners, which was initially granted. However, later they were barred from entering the installations. The exclusion was predicated upon the determination that the clergymen's "conduct, both on and off the base, was detrimental to the good order and discipline of the service." When the clergymen sued to have the bar lifted by court order, the courts refused. The Ninth Circuit Court of Appeals, citing the Cafeteria & Restaurant Workers Union case, held the exclusion valid—although the court did look to whether the exclusion order was patently arbitrary or discriminatory, and finding it not, denied the clergymen's pleas.

In contrast to the foregoing cases, there is the case of <u>Kiiskila v. Nichols</u>, <sup>741</sup> discussed previously in this paper. The facts in that case, it will be recalled, were that the lady in question was a known anti-war protester employed on the installation, but she had never conducted any anti-war activities on the installation itself. However, she did have

<sup>740311</sup> F. Supp. at 972.

<sup>741</sup> See supra, n. 611.

for possessing that literature that she was barred. The court looked at the Department of Defense directives discussed earlier in this paper as they relate to the distribution of literature on military installations, and finding no violation for the mere possession of anti-war literature, the court directed the exclusion order to be lifted.

What is interesting about the Kiiskila case, however, is dicta indicating its view that the Cafeteria & Restaurant Workers case would not be dispositive of the Kiiskila case, had other grounds not been available for deciding the case favorably for the petitioner. All the cases cited above are clear that Cafeteria & Restaurant Workers Union permits the military commander to exclude from his installation without a hearing, so long as his action is neither arbitrary nor discriminatory. In two footnotes in the Kiiskila opinion, however, the court opined that to exclude Kiiskila without a hearing would equal a denial of due process. 742 The Cafeteria & Restaurant Workers Union case was distinguished because the union contract in that case specifically provided for exclusion in security cases, and because the employee who was excluded was offered employment elsewhere--and neither of these factors was present in the <u>Kiiskila</u> case. 743 It is, of

<sup>742433</sup> F.2d at 747, n. 1 and 2.

<sup>743</sup> Id.

course, true that in both Kiiskila and Cafeteria & Restaurant Workers Union the individual excluded was a civilian employed on the installation; thus the bar had much more serious consequences for these ladies, since it amounted to firing them from their employment, than did the exclusion orders in the Weissman and Flower cases, for example, where neither man was employed on the installation. However, the same standards were applied in both of the juvenile cases cited above -- and one of them concerned the dependent son of a civilian employed on the installation, and the other involved a military dependent whose father was serving an unaccompanied overseas tour of duty, leaving his wife and son to reside in the civilian community adjacent to the military installation from which the boy was excluded. Clearly in both of these juvenile cases there was a definite impact arising from the exclusion order; yet, as noted before, Flower and both the juvenile cases were decided by the same court, and the same legal standard--namely, Cafeteria & Restaurant Workers Union -- was applied to all three without differentiation.

Thus it appears that had the <u>Kiiskila</u> decision turned on the considerations stated in the referenced footnotes, that decision would certainly have been a departure from the traditional approach taken by most courts. That traditional approach is that military commanders may exclude civilians

from their installation without a hearing, so long as the basis for the exclusion order is neither arbitrary nor discriminatory.

## C. Summary

The point here is that in relation to both servicemen and civilians alike, the military has certain wide administrative authority which it can employ in cases involving First Amendment rights. But in both situations, it is submitted that the rules almost exclusively relied upon by the courts ought not to be used so unquestioningly. As to military personnel, Orloff v. Willoughby is cited, usually without more analysis. As to civilian personnel, Cafeteria & Restaurant Workers Union is similarly cited, also without more analysis. This is not to say that the legal principles established by these cases are totally wrong; clearly they are not. Clearly the prohibitions against arbitrary and discriminatory decisions in exclusion cases established in the Cafeteria & Restaurant Workers Union case are proper and should continue to be applied. Nor is it to say that a hearing should be afforded, as the court in the Kiiskila case was apparently prepared to rule, had it not been able to dispose of the case on other grounds. But it is submitted that the courts' almost blind reliance on Orloff and Cafeteria & Restaurant Workers Union is insufficient; rather, the approach articulated in

Cortright v. Resor (although the court itself did not follow through after stating the approach!) is the better approach and should be grafted on to the current rules. Cortright does not destroy any of the old rules; it, too, stands for the proposition that military commanders have wide discretion in the exercise of their administrative powers. However, in addition to testing the exercise of those powers for arbitrary or discriminatory abuse, Cortright also says that the validity of the commander's decision ought to be tested by the individual's constitutional rights, whenever the administrative decision encroaches thereon. This test would determine whether the individual's rights outweigh the commander's discretionary authority. Reliance on Orloff and Cafeteria & Restaurant Workers Union leaves no room for looking to any constitutional issues which might be involved and so results in decisions which are too narrow. Engrafting Cortright on to the traditional standards would result in much more fair decisions -- and decisions which would at least consider any constitutional claims which might be involved.

Thus while military commanders do indeed have wide discretion to take a wide range of administrative actions, that discretion is not plenary. It also ought to be subject to review in an appropriate case for constitutional infirmity. But it also ought to be made clear that the plaintiff, be he serviceman or civilian, will have a heavy burden to show that the commander's administrative decision should be set aside.

## CONCLUSIONS

Beginning with the proposition that the Framers never intended the Bill of Rights to apply to servicemen, Part I of this paper showed the developmental change from that view to the present constitutional rule: The provisions of the Bill of Rights apply to servicemen, "except insofar as they are made inapplicable either expressly or by necessary implication." The is the task of the courts to determine what is expressly inapplicable and what is inapplicable by necessary implication. The judicial body bearing the burden in accomplishing that task is the Court of Military Appeals; it, in turn, acknowledges that it is controlled by the Supreme Court. The is addition, all the Federal courts are actually involved, to the extent that military cases are brought to them, either directly or collaterally.

Thus the major task of this paper has been to analyze what the courts have had to say concerning various provisions of law, military regulations, and the actual practice of the military establishment, as they affect a serviceman's First Amendment rights.

First, it was determined that there is nothing in the law or in the content of the First Amendment itself that would

<sup>744</sup> United States v. Tempia, 16 U.S.C.M.A. 629, 634; 37 C.M.R. 249, 254 (1967).

<sup>74516</sup> U.S.C.M.A. at 635, 37 C.M.R. at 255.

make it inapplicable to servicemen. Second, a few general propositions were advanced which assisted in culling out certain questionable areas; these were the "expression" versus "action" test, and the "job-connected" versus "non-job-connected" test. But once a particular situation was determined to be job-connected expression and therefore within the purview of the First Amendment's guarantees, these initial determinations only served to indicate that a constitutional determination was required to be made.

The pivotal point on which every issue in the First Amendment area turns is the proposition that the freedoms stated in the First Amendment are not absolutes. This concept, advanced in the first case where the Supreme Court really tackled the issues involved in the First Amendment, 746 is critical. For, once it is accepted, the issue will always be to determine where the balance should be struck between the military's and the nation's interests on the one hand, and the individual's First Amendment rights on the other hand. Thus, to a large extent, the foregoing discussion has been couched in terms of the various military or national interests concerned, in an effort to determine whether they or the individual's First Amendment freedoms would prevail, when put in the balance.

<sup>746</sup> schenck v. United States, supra n. 436.

This was not so clear in the area of the establishment of religion, since there <u>individual</u> freedoms are not so much in issue. However, it is interesting to note that the one unconstitutional act of the military in this context was where the power of Government has been brought to bear directly on the individual by making chapel attendance at the service academies mandatory. But where the Government merely facilitates a serviceman's exercise of his religion, through the military chaplaincy program, no constitutional infirmity was found. Or where a valid military purpose could be advanced, as in the Army's and Air Force's "character guidance" program, again it was determined that there was probably no constitutional defect.

When the discussion turned to the issues of a serviceman's freedom to exercise his religion, and his freedom of
expression, however, the analytical task of balancing the interests was much more in evidence. Since it is clear in any
given case what the serviceman's interest would be (namely,
the free exercise of his religion, or his freedom of expression), the first major task was to determine what was
the military or national interest involved in the particular
situation at hand. Only after that interest had been isolated
could it be balanced against the serviceman's First Amendment
freedoms.

In most cases, the issue was simply "to balance" the

of the military's need for a readily-available force of able-bodied men in contrast to the serviceman's freedom to exercise his religious beliefs, the issues were simply which one prevailed: Did the serviceman's right (for example) to leave his military duties without permission in order to attend a religious retreat outweigh the military interest for his presence?; or did the serviceman's religious scruples against medical treatment or innoculations outweigh the military interest in maintaining his and the unit's health?

However, when the issues involved the military's need for efficient operations, the maintenance of good order, loyal-ty, and morale, and especially its need for discipline, the balancing of interests was found to be best effected by applying the clear and present danger test: Did the serviceman's exercise of his First Amendment freedoms in the particular situation pose a clear and present danger to efficient military operations, or the maintenance of good order, loyalty, morale, and/or discipline? Especially when military discipline was in the balance, it frequently outweighed the serviceman's First Amendment rights.

On the other hand, in not every case did the military's professed interests prevail; Article 88 of the Uniform Code of Military Justice is the notable example. As currently written, it simply cannot be justified as a constitutional exercise of

Congress' power. In addition, it was noted that the courts (especially the civilian courts) will not always accept an unsupported assertion by the military that a serviceman's conduct would present a clear and present danger to some military value. Instead, the military will have the burden to show that the serviceman's First Amendment freedoms should give way to the military interest concerned.

If nothing else, all the foregoing makes one point clear beyond question: A serviceman's First Amendment rights are significantly less than a civilian's. But that does not mean that a serviceman has no First Amendment rights; it does not mean that the First Amendment does not apply to him. On the contrary, there is no question but that the First Amendment does apply to servicemen. But because the First Amendment is not an absolute, the military situation simply brings into play different factual considerations which must be balanced against the individual's First Amendment rights. And when that balance is struck, the military and national interests frequently outweigh the individual's interests. The results are not different because the rule of law is different; the results are different because the factual considerations are different.

Thus, it is perhaps most clear to say that although the First Amendment does apply to servicemen, it applies "differently."